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No. 99–

IN THE
# Supreme Court of the United States

KANSAS STATE UNIVERSITY,
*Petitioner,*

v.

MARK AND GENEVIEVE INNES,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

i. Did the Tenth Circuit err when, in conflict with the decisions of this Court and of other United States Courts of Appeal on the same important matter, it held that a state official need not have explicit authority to waive a state's Eleventh Amendment immunity?

ii. May Congress delegate its so-called spending power to federal agencies to effectuate an abrogation of the States' Eleventh Amendment immunity?

iii. Can Eleventh Amendment immunity be constructively waived by state officials who lack the express authority to waive such immunity?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED | 1 |
| STATEMENT | 2 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. The Tenth Circuit Rendered A Decision In Conflict With The Decisions Of This Court And Of Other United States Courts Of Appeal When It Held That A State Official Need Not Have Explicit Authority To Waive A State's Eleventh Amendment Immunity In Order To Effect Such A Waiver | 7 |
| II. The Tenth Circuit Has Decided The Important Question Of Federal Law That Congress Can Delegate Its Spending Powers To Administrative Agencies In The Executive Branch To Effect A Conditional Waiver Of A State's Eleventh Amendment Protection, In Conflict With Relevant Decisions Of This Court | 10 |
| III. The Tenth Circuit Has Decided The Important Question Of Federal Law That A State Can Constructively Waive Its Eleventh Amendment Immunity By Agreeing To Follow Federal Regulations, In Conflict With Relevant Decisions Of This Court | 14 |
| CONCLUSION | 21 |

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Alden v. Maine*, 119 S.Ct. 2240 (1999) ..... 9
*Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) ..... 6, 9, 13, 16
*Bradley v. Arkansas Dept. of Education.*, 189 F.3d 745 (8th Cir. 1999) ..... 12, 14, 15
*Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971) ..... 4
*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999) ..... 13, 14, 15
*In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997) ..... 9
*Edelman v. Jordan*, 415 U.S. 651 (1974) ..... 12, 17
*Employees of Dept. of Public Health and Welfare, Missouri, v. Dept. of Public Health and Welfare, Missouri*, 411 U.S. 279 (1973) ..... 14
*Estate of Porter v. Illinois*, 36 F.3d 684 (7th Cir. 1994) .. 8
*Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981) . 17
*Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945) ..... 8
*Freimanis v. Sea-Land Service Inc.*, 654 F.2d 1155 (5th Cir. 1981) ..... 8
*Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989) ..... 12
*Magnolia Venture Capital Corp. v. Prudential Securities*, 151 F.3d 439 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1115 (1999) ..... 8
*Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964) ..... 11, 12
*Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.*, 506 U.S. 139 (1993) ..... 19, 20

*Reyes v. Sazan*, 168 F.3d 158 (5th Cir. 1999) ..... 20
*Santee Sioux Tribe v. Nebraska*, 121 F.3d 427 (8th Cir. 1997) ..... 8
*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ..... 12,19
*Sherwinski v. Peterson*, 98 F.3d 849 (5th Cir. 1996) ... 20
*Silver v. Baggiano*, 804 F.2d 1211 (11th Cir 1986) ..... 8
*In re Snyder*, 228 B.R. 712 (Bankr. D. Neb. 1998) .... 17
*South Dakota v. Dole*, 483 U.S. 203 (1987) ..... 11, 12
*United States v. Nordic Village Inc.*, 503 U.S. 30 (1992) ..... 19
*Watson v. University of Utah Medical Ctr.*, 75 F.3d 569 (10th Cir. 1996) ..... 4
*Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987) ..... 11

**Statutes and Regulations**

11 U.S.C. § 523(a)(8) ..... 2
28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1334 ..... 4
Kan. Stat. Ann. § 76-723 ..... 2, 3
34 C.F.R. § 600.4 ..... 14
34 C.F.R. § 668.2(a) ..... 14
34 C.F.R. § 674.2(a) ..... 14
34 C.F.R. § 674.8 ..... 14
34 C.F.R. § 674.49 ..... 2, 4, 5
64 Fed. Reg. 58298 (Oct. 28, 1999) ..... 4

## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit holding that Kansas State University waived its Eleventh Amendment immunity in bankruptcy court is reported, 184 F.3d 1275 (10th Cir. 1999), and is included at Pet. App. 1a-17a. The opinion of the United States District Court for the District of Kansas is unreported and is included at Pet. App. 18a-23a. The opinion of the United States Bankruptcy Court for the District of Kansas is reported, 207 B.R. 953 (1997), and is included at Pet. App. 24a-33a. The Order denying Kansas State University's Petition for Rehearing and Petition for Rehearing *en Banc* is attached at Pet. App. 34a-35a.

## JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision on August 26, 1999. Kansas State University filed a timely Petition for Rehearing and Petition for Rehearing *en Banc* on September 7, 1999, which was denied on September 20, 1999. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1.

## CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of any foreign state.

K.S.A. § 76-723 provides:

> The board of regents, or any state educational institution with the approval of the board of regents, may make and file applications for federal funds appropriated and made available by federal law for purposes related to the operation or function of such board or institution. The board of regents, or any state educational institution with the approval of the board of regents, may receive from the federal government, or any of its agencies, any funds made available under existing law, rules or regulations, or that may hereafter be made available. The board of regents, or any state educational institution with the approval of the board of regents, may expend the same in accordance with the law, and the rules, regulations and requirements under which such funds are made available. Such moneys shall be expended only in accordance with and for the purposes specified in federal law. Federal funds shall be deposited in the state treasury.

34 C.F.R.§ 674.49 (*See* Pet. App. 44a-48a.).

## STATEMENT

### Procedural History

Respondents Mark and Genevieve Innes filed an adversary proceeding in bankruptcy court against Kansas State University ("KSU") seeking an order that student loans held by KSU were dischargeable as "undue hardships" under 11 U.S.C. § 523(a)(8). KSU filed a motion to dismiss, asserting Eleventh Amendment immunity. The bankruptcy court denied the motion and the district court affirmed. KSU then took an interlocutory appeal to the Tenth Circuit which affirmed the lower courts' decisions. KSU filed a timely petition for rehearing and petition for rehearing *en banc*, which the Tenth Circuit denied without comment. Pet. App. 34a-35a.

**Statement of Facts**

1. *The Facts*

The Kansas Legislature passed a statute, K.S.A. § 76-723, which permits state universities to apply for, receive, and expend federal funds. The statute never references venue, jurisdiction, or the Eleventh Amendment. Subsequently, KSU applied for, received and expended Perkins Loan funds from the United States Department of Education ("USDOE"). A portion of those funds were loaned to the respondents in this case and are the subject of their adversary proceeding seeking to have the loan held dischargeable in bankruptcy.

Perkins Loan funds are provided to participating universities, both public and private, as loans to the universities which are expected to be fully repaid to the USDOE after a period of time, subject to debits for permitted expenditures and write-offs. But before the funds are paid back to the USDOE, the majority of them are loaned to students. Then, after a student pays back the loan, the funds are re-circulated to another student who hopefully will repay the loan for redistribution to another student, and so on.

In order to receive the funds, the USDOE requires KSU, and any other private or public university, to execute a participation agreement with the USDOE. A copy of the relevant portions effective as of the time of the controversy is attached at Pet. App. 36a-43a. Among other things, the participation agreement incorporates the USDOE's forty-eight regulations on the applicable Perkins funds covered by the agreement along with hundreds of others, but never references venue, jurisdiction, or the Eleventh Amendment. In this case, a KSU Vice-Provost for Research entered into the agreement, and Perkins Loan funds were made available to KSU for distribution to KSU students.

The hundreds of incorporated USDOE regulations outline the expectations for every participating university, including

what to do when a Perkins Loan borrower files bankruptcy. 34 C.F.R. § 674.49. (Pet. App. 44a-48a).[1] Among other things, that particular USDOE regulation requires participating universities to oppose a borrower's request for a determination of dischargeability. 34 C.F.R. § 674.49(c)(5)(i). The regulation never references venue, jurisdiction, or the Eleventh Amendment.

While attending Kansas State University, Mr. Mark Innes applied for and received a Perkins Loan which was managed by KSU. After graduation, the Innes' filed for bankruptcy and sought an order of dischargeability for both their student loans as undue hardships. KSU appeared in the case and filed a motion to dismiss on the basis of its Eleventh Amendment immunity.[2] KSU has never filed a proof of claim or performed any other activity in bankruptcy court in this case.

2. *The Bankruptcy Court*

Pursuant to 28 U.S.C. § 1334, the debtors filed an adversary proceeding against several student loan holders, *(i.e.*, creditors) including KSU. KSU filed a motion to dismiss asserting its Eleventh Amendment immunity which the bankruptcy court denied. Without citation to any authority, the bankruptcy court held that KSU had waived its Eleventh Amendment immunity.

The bankruptcy court found that KSU's waiver arose from the general Kansas legislative directive to "abide by whatever

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[1] The regulation has been amended in ways not material to the issues presented here. *See* 64 Fed. Reg. 58298, 58313 (Oct. 28, 1999) (effective July 1, 2000). Similarly, the contract between KSU and USDOE also has been amended in ways not material to the issues presented here.

[2] Under Kansas and federal law, KSU is an "arm of the State" protected by Eleventh Amendment immunity. *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971); *See also Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 574-75 (10th Cir. 1996).

federal law and regulations might govern qualifying educational programs like the Federal Perkins Loan Program." *Innes v. Kansas State University*, Pet. App. 28a. The court then held that this permission authorized KSU to enter into the participation agreement, which did not "simply provide that [KSU] will abide by federal law and regulations, but specifically identifies various regulations, including 34 C.F.R. § 674.49." *Id.* This incorporated federal regulation, the bankruptcy court held, "requires KSU to perform various tasks that can take place only in the bankruptcy court" under certain circumstances, even though the action at bar could have been in either state or bankruptcy court. Pet. App. 32a. The court concluded that "[t]his was not a general agreement to follow federal law and regulations, but a specific agreement, authorized by the Kansas legislature, to participate in proceedings before a federal bankruptcy court." Pet. App. 33a.

3. *The District Court*

On appeal, the District Court affirmed the decision of the bankruptcy court. The District Court held that the general legislative permission to apply for, receive, and expend federal funds, "[s]tanding alone, . . . does not appear to express the requisite intent to waive immunity." Pet. App. 22a. The district court continued that "[t]he statute, however, must not be examined independently of the Agreement it purports to authorize." *Id.* The court held that the contract identified specific regulations which obligated "KSU to perform certain functions that must occur in the court where the borrower has filed for bankruptcy." *Id.*

The court dismissed KSU's argument that because such activities could be in either state or federal court, an unequivocal waiver cannot exist. The court held that simply because "the regulation [which is purported to waive Eleventh Amendment immunity] provides to a borrower the option of proceeding in state court does not alter the fact KSU expressly agreed to the terms of 34 C.F.R. § 674.49, which allows for

proceedings in federal bankruptcy court." Pet. App. 23a. The court concluded that "the integration of the Agreement and Kan. Stat. Ann. § 76-723 creates an overwhelming implication that KSU waived its Eleventh Amendment immunity for purposes of performing those functions that must occur where its borrower has filed for bankruptcy in a federal bankruptcy court." *Id.*

4. *The Tenth Circuit*

A panel of the Tenth Circuit affirmed the lower courts. The Tenth Circuit held "that KSU knowingly and voluntarily waived its Eleventh Amendment immunity by agreeing, as a prerequisite to its participation in the Perkins Loan program, to undertake certain enumerated actions in federal bankruptcy court in the event of a claim for discharge filed by the student-borrower." *Innes v. Kansas State University*, 184 F.3d 1275, 1284 (10th Cir. 1999), Pet. App. 15a.

The Tenth Circuit acknowledged that KSU's Eleventh Amendment immunity had not been waived by a Kansas statute or constitutional provision. Nonetheless, relying on a footnote in *Atascadero State Hospital. v. Scanlon*, 473 U.S. 234 (1985), and Congress's spending power, the court held "that it is permissible to assess the conduct of the party claiming immunity within the context of the federal program, including the specific contract and the governing federal regulation, to determine whether the state entity expressed an unequivocal intent to waive." Pet. App. 9a. The court reasoned that "because the contract explicitly states that KSU agrees to perform the obligations imposed by 34 C.F.R. § 674, [we agree] with the district court that by including this particular regulation in the contract KSU necessarily consented to perform certain functions in the federal bankruptcy court pursuant to § 674.49." Pet. App. 12a.

The Tenth Circuit acknowledged that this case does not involve the sort of "clear statement" required to abrogate or

find a wavier of Eleventh Amendment immunity, but opined that the USDOE regulations "contain what the language must impart — the State plainly must be on notice that by electing to participate in this federally funded program it accepts affirmative obligations to pursue or defend claims in federal court on the merits, despite its Eleventh Amendment immunity." Pet. App. 13a. Thus, in the Tenth Circuit's view, "KSU's entry into a contract which specifically requires it to abide by 34 C.F.R. § 674 means that KSU has unequivocally subjected itself to federal bankruptcy court jurisdiction pursuant to § 674.49 for purposes of the Perkins Loan Program." Pet. App. 14a.

The Tenth Circuit also rejected two other arguments KSU made. First, the court rejected KSU's claim that because the actions KSU was required to perform under the USDOE regulations could occur in either state or federal court, any waiver of the Eleventh Amendment immunity was not unequivocal. It held that "KSU agreed to perform obligations under *both* state and federal court." (Sic.) Pet. App. 15a. Second, KSU argued that it did not have the legal authority to waive Eleventh Amendment immunity. The court rejected that argument, reasoning that because the Kansas statute authorizing universities to enter such contracts failed to *explicitly reserve* the power to waive Eleventh Amendment immunity, the immunity could be waived. Pet. App. 15a-16a.

## REASONS FOR GRANTING THE WRIT

### I. The Tenth Circuit Rendered A Decision In Conflict With The Decisions Of This Court And Of Other United States Courts Of Appeal When It Held That A State Official Need Not Have Explicit Authority To Waive A State's Eleventh Amendment Immunity In Order To Effect Such A Waiver.

This Court, as well as most Circuits, has held that a state official who is alleged to have waived a state's Eleventh

Amendment immunity must have done so under a valid and express grant of power. The Tenth Circuit, however, held the opposite in this case, concluding that unless the power to waive the Eleventh Amendment is expressly reserved in a state statute, state officials have the power to waive the State's Eleventh Amendment immunity.

This Court has long held that waivers of the Eleventh Amendment can be effected only by state officials with the explicit state statutory or constitutional authority to do so. *Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945), requires that the determination of who has such authority be made under state statutes, constitutions or decisions. *Id.* at 467-69. "The issue thus becomes one of their power under state law to [waive the state's immunity]. . . . [T]his court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions." *Id.* at 467.

Most Circuits have followed *Ford Motor Co.* *See e.g.*, *Magnolia Venture Capital Corp. v. Prudential Securities*, 151 F.3d 439, 445 (5th Cir. 1998) ("[A] state, through its constitution, statutes, or court decisions, must expressly authorize a state agency or representative to waive the state's Eleventh Amendment immunity. Such authority cannot be implied from the circumstances."), *cert. denied*, 119 S.Ct. 1115 (1999); *Santee Sioux Tribe v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) ("State official may waive the state's immunity only where specifically authorized to do so by that state's constitution, statutes, or decisions."); *Estate of Porter v. Illinois*, 36 F.3d 684, 690 (7th Cir. 1994) ("[S]tate officials can only waive a state's Eleventh Amendment immunity if they are specifically authorized to do so by the state's constitution, statutes, or decisions."); *Silver v. Baggiano*, 804 F.2d 1211, 1214 (11th Cir 1986) ("[A] waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state 'in its constitution, statutes and decisions.'"); *Freimanis*

*v. Sea-Land Service Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981) (No waiver where attorney for the department had "no clearly expressed authority to waive [E]leventh [A]mendment immunity."); *In re Creative Goldsmiths*, 119 F.3d 1140, 1149 (4th Cir. 1997).

The Tenth Circuit, however, applied a contrary rule in this case, when it held that legislative silence with respect to immunity was tantamount to the grant of authority to waive immunity. Specifically,

> We easily resolve this question [of whether KSU had the authority to waive Eleventh Amendment immunity] by examining the enabling legislation, Kan. Stat. Ann. § 76-723. Nothing in the statute itself makes entering into a contract waiving immunity an *ultra vires* act. Indeed the contrary is true — this legislation explicitly gives KSU, as a state educational institution, expansive, unlimited authority to contract with the DOE so that KSU may participate in student financial assistance programs. Further, unlike in other Kansas statutes, there is no provision in § 76-723 *disclaiming a waiver* or *prohibiting consent to waive*.

Pet. App. 16a (Emphasis added).

Legislative silence is not a grant of authority to waive a constitutional protection. The Tenth Circuit's presumption that legislative silence grants state officials waiver authority ignores the principle that Eleventh Amendment immunity is an *inherent* characteristic of state government. *See Alden v. Maine*, 119 S.Ct. 2240 (1999). A State, therefore, need do nothing to show that it intends to retain the full measure of its immunity. Rather, a claimant against the State must prove an affirmative intention, in a state statute or the state constitution, to waive such immunity. *Atascadero State Hosp. v Scanlon*, 473 U.S. 234 (1985).

Interpreting a State's silence as a waiver of Eleventh Amendment immunity contravenes this Court's decisions. Summary reversal of the Tenth Circuit is appropriate in light of the Court's prior decisions or, in the alternative, *certiorari* should be granted to resolve this issue.

## II. The Tenth Circuit Has Decided The Important Question Of Federal Law That Congress Can Delegate Its Spending Powers To Administrative Agencies In The Executive Branch To Effect A Conditional Waiver Of A State's Eleventh Amendment Protection, In Conflict With Relevant Decisions Of This Court.

The Spending Clause cannot be used to extract a waiver of a state's Eleventh Amendment immunity where such waiver is found in federal *regulations from the executive branch*. Even assuming that the Spending Clause can be used to extract a conditional waiver of the Eleventh Amendment, only Congress can set such a condition, not a federal executive agency such as the United States Department of Education; States must be put on notice that their acceptance of the funds will be deemed a waiver by unequivocally clear language in the *statute* authorizing the program.[3]

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[3] The Tenth Circuit held that, under a Spending Clause waiver analogy, funds which were received could be conditioned by USDOE regulations requiring States to waive their Eleventh Amendment immunity.

> Indeed, *College Savings Bank* reaffirms the proposition that a waiver may be found in a state's acceptance of federal funds with conditions attached. *See id.* at *8 n.2 (confirming that *Atascadero* remains good law and explaining that "conditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity"). The uncontroverted, historical facts of this case, in which a state agency with delegated authority explicitly consents to participate in a federal program and to follow the conditions thereof, including participation in certain federal bankruptcy court functions, is closely analogous to the waiver found in a state's acceptance of

Assuming the Spending Clause can be used to procure the waiver of states' Eleventh Amendment immunity, the waiver must be found in the language of the *congressional* act which authorizes the expenditure. *See Welch v Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 477 (1987) (citing *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184, 198-99 (1964) (White J., dissenting) ("It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when *Congress* has clearly considered the problem and *expressly declared* that any State which undertakes given regulable conduct will it be deemed thereby to have waived its immunity should courts disallow the invocation of this defense.")(emphasis added, quotation omitted); *Parden*, 377 U.S. at 199 ("A decent respect for the normally preferred position of constitutional rights dictates that if *Congress decides* to exercise its power to condition privileges within its control on the forfeiture of constitutional rights its intention to

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conditioned federal funds and differs greatly from mere participation in "otherwise commercial lawful activity." *Id.*; *see also id.* at *12 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987), and noting that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that *acceptance of the funds entails an agreement to the actions*" (emphasis added)). Accordingly, we hold that it is permissible to assess the conduct of the party claiming immunity within the context of the federal program, including the specific contract and the governing federal regulation, to determine whether the state entity expressed an unequivocal intent to waive.

Pet. App. 9a. The "actions" referenced above, however, are actions which are mandated by a federal agency, not Congress. The Tenth Circuit's decision in this case automatically granted a Department of Education's regulations published in the C.F.R. the same status as an express congressional statutory provision. With all due respect, such regulations cannot be a basis for waiver under an analogy to Spending Clause powers.

do so should appear with unmistakable clarity.") (White J., dissenting) (emphasis added); *Id.* at 200 ("*Congress'* failure to bring home to the State the precise nature of its option makes impossible the 'intentional relinquishment or abandonment of a known right or privilege' which must be shown before constitutional rights may be taken to have been waived.") (emphasis added); *Edelman v. Jordan*, 415 U.S. 651, 672 (1974) ("[t]he question of waiver or consent under the Eleventh Amendment was found in [*Parden* and *Petty*] to turn on *whether Congress had intended* to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.")(emphasis added); *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745, 751-53 (8th Cir. 1999) (clear, unambiguous federal statute creating the federal spending program is necessary to condition waiver for participation in the federal spending program); *see also Hoffman v. Connecticut Dept. of Income Maint.*, 492 U.S. 96, 101 (1989)(abrogation must be 'unmistakably clear in the language of the statute'"); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)( "Incident to this power [under the Spending Clause], *Congress* may attach conditions on the receipt of federal funds, . . . .") (emphasis added).

In no case has the Court permitted a federal agency to set the conditions upon which a Spending Clause waiver may be effected. In the present case, the Tenth Circuit elevated regulations promulgated by a federal agency to the level of congressional enactment when it held that such regulations could condition the receipt of funds and effectuate the waiver of a state's Eleventh Amendment immunity.

Further, Congress lacks the authority under its Article I spending power to abrogate a state's Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

As this Court recognized in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2229 (1999), constructive waivers and abrogation are the same. To be valid, therefore, a constructive waiver must pass the *Seminole Tribe* test, namely (1) that Congress has unequivocally expressed its intent to abrogate the immunity in the language of the statute, and (2) that Congress acted pursuant to a valid exercise of power.

This Court has been explicit that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero State Hosp. v Scanlon*, 473 U.S. at 246-247. In addition, *Atascadero* held that receipt of federal funds which required compliance with federal law that required submission of jurisdiction to federal court, fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity. Thus, were we to view this statute as an enactment pursuant to the Spending Clause, Art. I, Sec. 8, . . . we would hold that there was no indication that the State of California consented to federal jurisdiction." *Id.* at 247.

In *College Savings Bank,* this Court declared that:

> [W]hat Congress threatens if the State refuses to agree to its condition [under a Spending Clause disbursement] is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. . . . [W]e think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion [associated with the waiver of Eleventh Amendment immunity through a Spending Clause disbursement] is automatically passed — and the voluntariness of waiver destroyed — when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

119 S.Ct. at 2231. *See also Employees of Dept. of Public Health and Welfare, Missouri, v. Dept. of Public Health and Welfare, Missouri*, 411 U.S. 279, 296 (1973)(Marshall J., concurring) ("To suggest that the State had the choice of either ceasing operation of these vital public services [of hospital care] or 'consenting' to federal suit suffices, I believe, is to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case."); *see also Bradley v Arkansas Dept. of Edu.*, 189 F.3d at 753 (holding that forcing a state to renounce funding as only means to retain its Eleventh Amendment immunity is impermissible coercion).

In the present case, the regulations alleged to effectuate the waiver are applicable without distinction to the otherwise lawful activity of disbursing Perkins student loan funds by both state and private universities. 34 C.F.R. §§ 674.2(a), 668.2(a), 600.4. Because both public and private universities must execute a contract as a condition precedent to receiving the student loan funds, 34 C.F.R. § 674.8, and because the program applies to both private and public universities, 34 C.F.R. §§ 674.2(a), 668.2(a), 600.4, conditioning participation by the public universities on waiving their constitutional Eleventh Amendment immunity would exclude the State from an otherwise permissible activity. Such an exercise of the spending power should therefore be ineffective. The Court should address and resolve this important federal issue.

## III. The Tenth Circuit Has Decided The Important Question Of Federal Law That A State Can Constructively Waive Its Eleventh Amendment Immunity By Agreeing To Follow Federal Regulations, In Conflict With Relevant Decisions Of This Court.

Constructive waiver in the context of the Eleventh Amendment was an experiment which this Court rejected in *College Savings Bank v. Florida Prepaid Postsecondary*

*Education Expense Board*, 119 S.Ct. 2219. Just as constructive waiver would never be sufficient with other rights created or recognized by the Constitution, it is not valid with regard to the Eleventh Amendment.

*College Savings Bank* abolished the concept of constructive waivers of Eleventh Amendment immunity. It held that the "constructive-waiver experiment of *Parden* was ill-conceived, and [we] see no merit in attempting to salvage any remnant of it." 119 S.Ct. at 2228. "Whatever may remain of our decision in *Parden* is expressly overruled." *Id. See also Bradley v Arkansas Dept. of Educ.*, 189 F.3d at 752 (concept of constructive waiver is rejected by *College Savings Bank*). The Tenth Circuit in this case disagrees, and the split between the circuits requires the Court's attention and correction.

Nothing of constructive waiver remains. *College Savings Bank* expressly overruled every vestige of *Parden*. 119 S.Ct. at 2228. Any decision resting on constructive waiver must therefore be reversed.

Nonetheless, the Tenth Circuit resurrected *Parden* style waivers. It held that "we do not think it is so novel to suggest that the entire record and all the facts in this case should be examined to determine whether a waiver exists." Pet. App. 9a. It was in these facts that the alleged waiver was found. The Tenth Circuit held that KSU waived its Eleventh Amendment immunity by entering into a contract with a federal agency which "contain[s] what the language [for abrogation or waiver] must impart — the State plainly must be on notice that by electing to participate in this federally funded program it accepts affirmative obligations to pursue or defend claims in federal court on the merits, despite its Eleventh Amendment immunity." Pet. App. 13a. "Therefore, we hold that KSU knowingly and voluntarily waived its Eleventh Amendment immunity by agreeing, as a prerequisite to its participation in the Perkins Loan program, to undertake certain enumerated actions in federal bankruptcy court in the event of a claim for

discharge filed by the student-borrower." Pet. App. 15a-16a. Such a finding of constructive waiver based on participation in a federal program is invalid and must be reversed.

The entire basis for the Tenth Circuit's ruling on this issue was a single footnote in *Atascadero*. The footnote in *Atascadero* says that,

> A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. As we said in *Edelman* . . . "'[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.'"

473 U.S. at 238 n.1. *Atascadero*, however, went on to limit any such waiver to the text of the relevant state statute or constitutional provision, *id.* at 239, 241, and the constructive side of this dicta footnote was overruled in *College Savings Bank*. The Tenth Circuit therefore has no basis in this Court's decisions for its ruling.

Two other reasons exist why the "waiver" found by the Tenth Circuit requires review by the Court. First, the contract which allegedly gave rise to the waiver makes no mention of third parties and cannot serve as a waiver with respect to claims such third parties may later assert against the State. At most, the contract permitted a participating university to take certain actions in federal court. Even if contemplated, jurisdiction would be dependent on the performance of those actions, and, absent the actions, there is no waiver. Equally, if those actions could occur in state court, then there is nothing express about the purported waiver and it must fail. The sanction for violating the agreement comes from the party, the

USDOE, not a student loan recipient. Such sanction is the cutting off of federal funds, not a waiver of immunity. *See Edelman v. Jordan*, 415 U.S. at 674; *In re Snyder*, 228 B.R. 712 (Bankr. D. Neb. 1998).

*Florida Department of Health and Rehabilitative Services. v. Florida Nursing Home Association*, 450 U.S. 147 (1981) (per curiam), reversed a lower court that had found waiver of Eleventh Amendment immunity through a contract. The Fifth Circuit had held that "'[b]y contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws.'" *Id.* at 149. The Court held that the *Edelman* principles prevented such a finding. *Id.* at 149-50. "[N]either such participation [in a federal program] in itself, nor a concomitant agreement to obey federal law, is sufficient to waive the protection of the Eleventh Amendment." *Id.* at 150. Thus, *Florida Department of Health and Rehabilitative Services*, makes clear that contract waivers must be express. That certainly is not the case here.

The central obligation which KSU, and any other participating institution, owes to the federal government through the agreement is to recover all funds that are loaned to students. The majority of these funds are loaned to the participating universities by the federal government for distribution to students who attend each participating university. Because the majority of the funds are not from the participating university, the universities have no inherent incentive to worry about whether the programs are operated under strict supervision or to make extensive efforts to collect the amounts owing on loans that become delinquent. Thus, in order to protect the federal fisc, the contract with the participating university obligates it to take actions to collect on these loans rather than to simply write off the sums. The

contract sets forth a series of measures to ensure that this loan collection process is carried out in a lawful, assertive but fair, and cost-effective method. All of the obligations assumed by the participating universities are geared to satisfying those objectives. Most of them are non-federal activities.

Thus, when a debtor is outside of bankruptcy, the participating university must carry out numerous collection duties. Then, if the debtor files for bankruptcy, certain changes must be made to the debt collection process. The participating university must cease nonbankruptcy collection methods (*i.e.*, obey the automatic stay) for the duration of the case; it must file a claim with the bankruptcy estate to recover funds from the estate if there are assets, but need not do so if this would be costly and futile (even though such payment, absent an adversary proceeding granting discharge filed in either state or federal court, will not foreclose the participating university from seeking collection of any remaining balance after the close of the bankruptcy); and it must be prepared to contest the discharge of the debt within the guidelines set by the contract. Among those rules are a requirement to assess whether the debtor can likely win a hardship discharge defense (in which case pursuit of the issue would not be cost-effective and would not be fair to the debtor), and whether it appears that a recovery will likely be large enough to make it worthwhile to continue nonbankruptcy collection methods (*i.e.*, will the participating university recover greater than 1/3 of the amount due?). If so, then the agreement says the participating university must oppose the discharge.

The manner of how to achieve these ends is left to each participating university. The contract and regulations do not require that discharge be resolved in federal court, just as the agreement does not specify in what manner the state should proceed with collecting a debt outside of bankruptcy. Nor does the agreement require any particular manner or timing of garnishment actions, or delineate any of the other day-to-day

detail of collecting a debt. The agreement simply tells the participating university not to sit back and write off federal funds, but instead to take the necessary actions to continue collecting the debt so that the funds can be loaned to another needy student. In the instance of defending federal bankruptcy actions seeking to discharge a student loan, public participating universities have two ways to oppose discharge: 1) appear and defend in federal bankruptcy court; or 2) rely on the Eleventh Amendment to stay out of federal court and then resolve the issues in state court. Indeed, the latter option may allow the state to return more quickly to the state forum in which any collection action will actually take place. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) ("'The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct.'"); *Seminole Tribe of Florida v. Florida*, 517 U.S. at 56.

Contrary to the Tenth Circuit's view, there is nothing unusual about a State taking the position that these issues can and should be heard in state court, and certainly nothing in the Bankruptcy Code that precludes the issues from being resolved there. The Code only requires four discharge exceptions to be heard in federal bankruptcy court, and this case does not involve any of them.

The second reason this issue merits the Court's review is that the Tenth Circuit failed to consider the full protection that the Eleventh Amendment affords, namely immunity from discovery. As the Court held in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc*, 506 U.S. 139 (1993), Eleventh Amendment immunity is an immunity from suit and is a legal determination made at the earliest stage of litigation. Factual inquiry into the constructive waiver of the Eleventh Amendment (and constructive waiver must by its nature be factual) is prohibited because the immunity recognized by the Eleventh Amendment is not just freedom

from suit but also freedom from discovery. *See also Reyes v. Sazan*, 168 F.3d 158, 161-62 (5th Cir. 1999) (benefits of the Eleventh Amendment are lost past motions practice); *Sherwinski v. Peterson*, 98 F.3d 849, 851 (5th Cir. 1996). In fact, in *Puerto Rico Aqueduct and Sewer Authority*, this Court prohibited the review of underlying and arguably relevant facts when it permitted the immediate appeal of any denial of Eleventh Amendment immunity, and stated that the benefits of such immunity are lost if an inappropriate case proceeds past motions practice. 506 U.S. at 145, 143-44, 147.

*College Savings Bank* overrules any remaining vestige of the *Parden* experiment, thus eliminating constructive waiver in the context of the Eleventh Amendment. The Eleventh Amendment can only be waived by express waiver or express invocation of federal jurisdiction, not by mere contractual agreements to follow federal regulations. With all due respect, the Tenth Circuit should be summarily reversed or, in the alternative, *certiorari* should be granted.

## CONCLUSION

For the foregoing reasons, Kansas State University respectfully requests that the Court either summarily reverse the decision of the Tenth Circuit, or grant *certiorari* in this case to resolve the Circuit conflict and conclusively establish the criteria necessary for a state to waive its Eleventh Amendment immunity.

Respectfully submitted,

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December 1999

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

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|---|---|
| In re: MARK INNES and GENEVIEVE INNES, Debtors. | |
| MARK INNES and GENEVIEVE INNES, Plaintiffs - Appellees, | |
| v. | No. 97-3363 |
| KANSAS STATE UNIVERSITY, State of Kansas Higher Education Assistance Foundation, Defendant - Appellant. | |

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August 24, 1999

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**
**D.C. No. 97-4075-DES.**

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Christopher F. Burger, Assistant Attorney General (Carla J. Stovall, Attorney General for the State of Kansas, with him on the briefs), Topeka, Kansas, for Defendant-Appellant.
Brenda J. Bell of Seaton, Miller and Bell, L.L.P., Manhattan, Kansas, for Plaintiff-Appellee.

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Before KELLY, McKAY, and LUCERO, Circuit Judges.

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I.

This case arises from an adversary proceeding instituted in the United States Bankruptcy Court against Kansas State University [KSU] in which the debtors, Mark and Genevieve Innes, sought to have their student loans discharged on the basis of undue hardship pursuant to 11 U.S.C. §§ 523(a)(8) and 1328. KSU answered the debtors' complaint, admitting that Mark Innes was indebted to KSU for $5,000 plus an amortized amount for each month since the debt became due in 1995. KSU further stated that the monthly amount due would "not impose an undue hardship on the debtors," and requested the court to deny the debtors' complaint and grant KSU's "costs and attorney's fees in defending this action." Appellant's App. at 15.

Subsequently, KSU filed a motion to dismiss the bankruptcy proceeding, claiming that it was immune from suit in federal court under the Eleventh Amendment. The bankruptcy court denied the motion. It held that KSU's agreement with the United States Department of Education to participate in the federal Perkins Loan Program requiring KSU to defend dischargeability claims in the bankruptcy court, coupled with Kansas legislation, acted as a waiver of the State's Eleventh Amendment immunity. *See Innes v. Kansas State Univ. (In re Innes)*, 207 B.R. 953, 957 (Bankr. D. Kan. 1997). KSU appealed that decision to the district court, *see* 28 U.S.C. § 158(c)(1)(A), which affirmed the bankruptcy court. *See* Appellant's App. at 96. KSU now appeals to this court. We have jurisdiction to hear this interlocutory appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (applying *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

On appeal, KSU reasserts the arguments it made to the bankruptcy and district courts, contending that neither Kan. Stat. Ann. § 76-723 nor KSU's contract with the DOE

evidences any intent to waive Eleventh Amendment immunity. KSU further argues that a state may waive its immunity only by express statements or overwhelming implication in a state statute or constitution, and that, therefore, it is impermissible to read the Kansas legislation, the contract, and the federal regulation in concert in order to find a waiver. The debtors respond that the terms of the Kansas legislation, the contract, and the federal regulation leave no room for any reasonable construction other than that KSU waived its immunity. We review de novo a district court's denial of a state's claim of Eleventh Amendment immunity from suit in federal court. *See Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1483 (10th Cir. 1995).

II.

The critical issue we must decide is whether KSU waived its Eleventh Amendment immunity in this adversary bankruptcy proceeding by entering into a contract with the DOE which requires KSU to perform certain actions in the event of the bankruptcy of the borrower. To answer this question, we must consider (1) the methods by which a state may waive Eleventh Amendment immunity, (2) whether KSU did in fact waive immunity, and (3) whether the waiver was valid.

A.

The Eleventh Amendment to the United States Constitution restricts federal jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Supreme Court has long interpreted the Eleventh Amendment to apply to federal suits brought by all persons against unconsenting states. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890)). Because KSU is an "arm of the state," it is entitled to assert Eleventh Amendment immunity. *See Watson v. University of Utah Med.*

*Ctr.*, 75 F.3d 569, 574-75 (10th Cir. 1996); *Brennan v. University of Kan.*, 451 F.2d 1287, 1290 (10th Cir. 1971). Eleventh Amendment immunity is not a defense where a state has waived it and consents to suit in federal court or where Congress has abrogated it by unequivocally expressing an intent to do so and acting pursuant to a valid exercise of power. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-40 (1985); *see also Seminole Tribe*, 517 U.S. at 55 (clarifying two-part test required to lawfully abrogate Eleventh Amendment immunity). Because the debtors concede that abrogation is not at issue in this case, we only address whether KSU waived its Eleventh Amendment immunity.[1]

In Atascadero, the Court explained that "[a] State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero*, 473 U.S. at 238 n.1. The Court further stated that both means of waiving immunity "require an unequivocal indication that the State intends to consent to

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[1] Because neither the bankruptcy court nor the district court relied on § 106(a) of the Bankruptcy Code, we do not address in this case whether it is constitutional. *See, e.g., Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 243-45 (3d Cir. 1998) (holding 11 U.S.C. § 106(a) unconstitutional to the extent that it purports to abrogate Eleventh Amendment immunity); *Department of Transp. & Dev. v. PNL Asset Management Co. (In re Estate of Fernandez)*, 123 F.3d 241, 244-46 (5th Cir.) (holding attempted statutory waiver of sovereign immunity under § 106(a) unconstitutional and listing similar cases), *amended by* 130 F.3d 1138 (5th Cir. 1997); *cf. Schlossberg v. Maryland (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997) (holding that § 106(a) & (b) offend the Eleventh Amendment), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1517 (1998). *But cf. Wyoming Dep't of Transp. v. Straight (In re Straight)*, 143 F.3d 1387, 1392 (10th Cir. 1998) (holding that 11 U.S.C. § 106(b) is unaffected by *Seminole Tribe*), cert. denied, ___ U.S. ___, 119 S. Ct. 446 (1998).

federal jurisdiction that otherwise would be barred by the Eleventh Amendment," *id.*; *see id.* at 241, and described "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction [as] a stringent one." *Id.* at 241. A waiver of Eleventh Amendment immunity will be found "only where stated 'by the most expressive language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation omitted); *cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, ___ U.S. ___, 119 S. Ct. 2219, 1999 WL 412639 at *8-*9 & n.2 (1999) (overturning the constructive or implied waiver principle set out in *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964)).

1.

We begin by ascertaining whether a Kansas statute or constitutional provision governing this case has expressly waived Eleventh Amendment immunity. *See Atascadero*, 473 U.S. at 238 n.1. Though Kansas has generally authorized suits brought in state court against state educational institutions, *see* Kan. Stat. Ann. § 76-713, its statutes have not expressly waived Eleventh Amendment immunity. *See Brennan*, 451 F.2d at 1290; *see also Atascadero*, 473 U.S. at 241 ("Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment . . . [absent] intent[] to subject itself to suit in *federal court*." (citations omitted)); *Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995) (holding that Utah did not waive its Eleventh Amendment immunity with respect to a suit brought in federal court because state statute provided for exclusive original jurisdiction in its own courts). Nor is there any waiver provision in the Kansas Constitution. Accordingly, KSU has not waived its immunity by this method.

2.

Our analysis, however, does not end here. In addition to examining the state's statutes and constitution, *Atascadero* instructs us to determine whether the state "otherwise waiv[ed] its immunity to suit in the context of a particular federal program." *Atascadero*, 473 U.S. at 238 n.1. Like the first type of waiver, this method requires an unequivocal indication that the state intends to consent to be sued in federal court. *See id.* at 238 n.1 & 241; *College Sav. Bank*, 1999 WL 412639, at *9-*10 (rejecting *Parden's* doctrine of constructive consent because it conflicts with the longstanding requirement that a waiver of a constitutional right must be unequivocally expressed and "altogether voluntary" (quotation marks and citation omitted)). Although this second method of waiver seems to allow looking beyond the text of a state statute or constitution to a state's conduct in relation to a federal program in order to find a waiver, KSU contends that *Edelman* and this court's decision in *Johns* restrict our analysis to examining only statutory and constitutional text to find a waiver. *See Johns*, 57 F.3d 1544 at 1553 (reading *Edelman* as requiring that a state may waive only expressly in a state statute or constitution or by overwhelming implication from the text of that state statute or constitution). Thus, KSU argues that in this case a waiver may only be found if the text of Kan. Stat. Ann. § 76-723 overwhelmingly implies no other reasonable construction. On the other hand, the debtors urge us to follow the approach taken by the bankruptcy and district courts-reading the legislation in concert with the contract and the federal regulation to determine whether they expressly state or overwhelmingly imply that KSU waived Eleventh Amendment immunity. To resolve this dispute, we must evaluate whether a state may waive immunity by its affirmative conduct in the context of a federal program or whether *Edelman* mandates that a state can waive only by express statements or overwhelming implication in its statutory or

constitutional text. *See Atascadero*, 473 U.S. at 238 n.1 & 239-40; *Edelman*, 415 U.S. at 673.

Several Supreme Court decisions provide that neither receipt of federal funds, participation in a federal program, nor an agreement to recognize and abide by federal laws, regulations, and guidelines is alone sufficient to waive Eleventh Amendment immunity. *See Atascadero*, 473 U.S. at 246-47 (holding that participation in federal programs and receipt of federal funds under such programs "fall[] far short of manifesting a clear intent . . . to waive immunity"); *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (stating that state agency's explicit agreement "to obey federal law in administering federal program can hardly be deemed an express waiver of Eleventh Amendment immunity"); *Edelman*, 415 U.S. at 673-74 (holding that neither mere participation in a federal program nor provision requiring compliance with federal law is sufficient to establish that the state consented to be sued in federal court); *accord Duke v. Department of Agric.*, 131 F.3d 1407, 1408 (10th Cir. 1997) (holding that New Mexico did not waive Eleventh Amendment immunity "by engaging in activities and entering contracts subject to federal regulation"). In spite of these holdings, however, this court and several others, including the Supreme Court, have concluded that, "in the absence of explicit consent by state statute or constitutional provision, a state may consent to a federal court's jurisdiction through its affirmative conduct." *Georgia Dep't of Revenue v. Burke (In re Burke)*, 146 F.3d 1313, 1318 (11th Cir. 1998) (holding that state waived its Eleventh Amendment immunity by filing proofs of claim in bankruptcy proceedings), *cert. denied*, ___ U.S. ___, 1999 WL 422421 (1999); *see Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) ("When the State becomes the actor and files a claim against the [bankruptcy] fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim."); *Straight*, 143 F.3d at 1389-90 (holding that state waived its immunity by filing

proofs of claim); *Dekalb County Div. of Family & Children Servs. v. Platter (In re Platter)*, 140 F.3d 676, 680 (7th Cir. 1998) (concluding that state's claim of Eleventh Amendment immunity did not bar action in bankruptcy court to determine discharge of debt because state had initiated adversarial action against debtor); *Rose v. United States Dep't of Educ. (In re Rose)*, 215 B.R. 755, 762 (Bankr. W.D. Mo. 1997) (deciding that state waived immunity by filing proofs of claim); *cf. Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (holding that Utah waived Eleventh Amendment immunity by causing removal to federal court and litigating merits of 42 U.S.C. § 1983 action).

None of these cases rely on the text of a state statute or constitution to determine that the state waived immunity. In fact, we observed in *Straight* that *Gardner* and *Platter* do not "rel[y] upon any specific basis for decision other than the state's having acceded to the jurisdiction of the bankruptcy court by seeking its relief against the debtor." *Straight*, 143 F.3d at 1390. *Cf. Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 467 (1945) (noting that appearance in suit by state attorney general would waive state's immunity if attorney general had authority under state law to waive immunity but holding that Indiana state law did not confer such authority); *Schlossberg v. Maryland (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1148-49 (4th Cir. 1997) (confirming that state generally waives Eleventh Amendment immunity to the extent that its "assertions in a state-instituted federal action, including those made with regard to a . . . proof of claim, amount to a *compulsory* counterclaim" but holding that Maryland law did not authorize waiver). In light of these cases, which firmly establish that a state agent acting with proper authorization can effectuate a waiver by filing a proof of claim or initiating an adversarial action in federal court, it necessarily follows that a waiver may be found not only in the text of a state statute or constitution but also by examining the underlying facts and circumstances of the case.

As a result, we do not think it is so novel to suggest that the entire record and all the facts in this case should be examined to determine whether a waiver exists.

Further, we do not think that either *Edelman* or the language in *Johns* relied on by KSU was intended to prevent courts from considering the underlying facts in the record to determine whether they overwhelmingly imply a waiver. Nor does anything in *College Savings Bank* foreclose us from examining the underlying facts. Although the Supreme Court overturned *Parden's* constructive consent principle, *see College Sav. Bank*, 1999 WL 412639, at *8-*9 & n.2, this case does not rely on constructive consent because it involves "a State's expressing unequivocally that it waives its immunity." *See id.* at *9. Indeed, *College Savings Bank* reaffirms the proposition that a waiver may be found in a state's acceptance of federal funds with conditions attached. *See id.* at *8 n.2 (confirming that *Atascadero* remains good law and explaining that "conditions attached to a State's receipt of federal funds are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity"). The uncontroverted, historical facts of this case, in which a state agency with delegated authority explicitly consents to participate in a federal program and to follow the conditions thereof, including participation in certain federal bankruptcy court functions, is closely analogous to the waiver found in a state's acceptance of conditioned federal funds and differs greatly from mere participation in "otherwise commercial lawful activity." *Id.*; *see also id.* at *12 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987), and noting that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that *acceptance of the funds entails an agreement to the actions*" (emphasis added)). Accordingly, we hold that it is permissible to assess the conduct of the party claiming immunity within the context of the federal program, including

the specific contract and the governing federal regulation, to determine whether the state entity expressed an unequivocal intent to waive.

B.

We now examine the Kansas legislation, the contract which KSU entered with the DOE, and the corresponding federal regulation to determine whether they reflect an unequivocal intent to waive Eleventh Amendment immunity. Section 76-723 of the Kansas Statutes Annotated allows state educational institutions to contract with the United States Department of Education to apply for and receive federal funds and to make the funds available under existing law, rules, or regulations for student financial assistance programs.[2] Known as a "participation agreement," the contract with the DOE controls KSU's participation in several student loan programs, including the Perkins Loan Program, which governs the loans subject to discharge in the underlying case. While the agreement indicates that KSU must comply generally with the terms and conditions of the agreement and with applicable

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[2] Kan. Stat. Ann. § 76-723 provides in full:

> The board of regents, or any state educational institution with the approval of the board of regents, may make and file applications for federal funds appropriated and made available by federal law for purposes related to the operation or function of such board or institution. The board of regents, or any state educational institution with the approval of the board of regents, may receive from the federal government, or any of its agencies, any funds made available under existing law, rules or regulations, or that may hereafter be made available. The board of regents, or any state educational institution with the approval of the board of regents, may expend the same in accordance with the law, and the rules, regulations, and requirements under which such funds are made available. Such moneys shall be expended only in accordance with and for the purposes specified in federal law. Federal funds shall be deposited in the state treasury.

federal law and regulations,[3] it also *explicitly* provides that KSU "agrees to perform the functions and activities set forth in 34 CFR [§ ] 674." *In re Innes*, 207 B.R. at 954. At the same time, § 674 requires the educational institution to exercise due diligence by complying with its specific provisions, including those described in § 674.49 concerning the bankruptcy of the borrower. *See* 34 C.F.R. Ch. VI, Subpart C; *id.* § 674.41.

Section 674.49 sets out the various responsibilities and duties that an educational institution must undertake and perform in the event of the bankruptcy of the borrower. First, the regulation states that, upon receiving notice of a petition filed in bankruptcy by the borrower, the institution "shall immediately suspend any collection efforts outside the bankruptcy proceeding against the borrower." *Id.* § 674.49(a). In this provision, the institution subjects itself to the mandatory stay provisions of federal bankruptcy law. Second, unless the borrower has no assets, the institution "shall file a proof of claim in the bankruptcy proceeding." *Id.* § 674.49(b). Third, the institution is required to follow the procedures set forth in subsection (c) if "it is properly served with a complaint in a proceeding under chapter 7, 11, 12 or 13 of the Bankruptcy

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[3] The general provisions of the contract state:

> The institution understands and agrees that it is subject to the program statutes and implementing regulations for each [program established under Title IV of the Higher Education Act of 1965 (HEA)] in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA and the Student Assistance General Provisions regulations set forth in 34 C.F.R. [§ ] 668. The institution also agrees to comply with all the relevant program statutes and regulations governing the operation of each Title IV, HEA program in which it participates.

*In re Innes*, 207 B.R. at 954.

Code, or under 11 U.S.C. [§] 1328(b), for a determination of dischargeability under 11 U.S.C. § 523(a)(8)(B) on the ground that repayment of the loan would impose an undue hardship on the borrower." *Id.* § 674.49(c)(1). Subsection (c) then sets forth several different obligations that the institution must undertake depending on the age of the loan and the costs of opposing the request for discharge. For example,"[i]f more than seven years of the repayment period on the loan . . . has passed before the borrower filed the petition for relief in bankruptcy, the institution may not oppose a determination of dischargeability requested . . . on the ground of undue hardship." *Id.* § 674.49(c)(2). Other obligations include determining whether repayment would impose an undue hardship, calculating the costs expected to be incurred if the institution determines that repayment will not impose an undue hardship, opposing the request for dischargeability if expected costs do not exceed one-third of the total amount owed on the loan, and determining whether grounds exist for seeking a conversion or dismissal of a chapter 13 case. *See id.* § 674.49(c)-(e).

Because the contract explicitly states that KSU agrees to perform the obligations imposed by 34 C.F.R. § 674, we agree with the district court that by including this particular regulation in the contract KSU necessarily consented to perform certain functions in the federal bankruptcy court pursuant to § 674.49. The inclusion of this federal regulation in the contract so clearly binds KSU to suit in federal bankruptcy court that if the contract were enacted into legislation it would undoubtedly satisfy *Edelman's* waiver test. To conclude that KSU intended anything other than a waiver would defy logic, contract law, and the equitable principles of bankruptcy. Indeed, we do not think it is either reasonable or possible to read the agreement and corresponding regulation, along with the authorizing Kansas legislation, to conclude that KSU intended anything other than a waiver. Thus, we hold that the overwhelming implication of this record, including the

statute, the contract, and the federal regulation, "otherwise reflect[s] an unequivocal intent to waive . . . immunity." *Ellis v. University of Kan. Med. Ctr.*, 163 F.3d 1186, 1195 (10th Cir. 1999).

We are aware of the type of language that has been held sufficient to abrogate or waive a state's Eleventh Amendment immunity in this context, specifically, 42 U.S.C. § 2000d-7(a), under *Atascadero* standards. *See Gebser v. Lago Vista Indep. Sch. Dist.*, ___ U.S. ___, 118 S. Ct. 1989, 1996 (1998); *Lane v. Pena*, 518 U.S. 187, 198 (1996); *Litman v. George Mason Univ.*, No. 98-1742, 1999 WL 547910, at *__, ___ F.3d ___, ___ (4th Cir. July 28, 1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied sub nom. Wilson v. Armstrong*, ___ U.S. ___, 118 S. Ct. 2340 (1998). While this case does not present the exact language, it does contain what the language must impart-the State plainly must be on notice that by electing to participate in this federally funded program it accepts affirmative obligations to pursue or defend claims in federal court on the merits, despite its Eleventh Amendment immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981). Given KSU's consent to these conditions, the applicable regulation, 34 C.F.R. § 674.49, with its many responsibilities and duties that must be performed in bankruptcy court, surely cannot be read to somehow preserve Eleventh Amendment immunity.

Additionally, we think that our decision in *Duke*, which holds that a state does not waive Eleventh Amendment immunity by merely "engaging in activities and entering contracts subject to federal regulation," is distinguishable for two reasons. *Duke*, 131 F.3d at 1408. First, the *Duke* court discussed the state's Eleventh Amendment claim in a very summary fashion. Although we have little knowledge about the federal regulation which the state apparently agreed to obey, we can infer from the facts of the case, which involved a child who was injured while camping in a national forest, that

neither the Bankruptcy Code nor the federal regulation governing the Perkins Loan Program were implicated. Second, and more importantly, *Duke* did not expand the law concerning the Eleventh Amendment that was established in *Edelman*, *Florida Nursing Home*, and *Atascadero*. Because none of these Supreme Court cases considered whether a state entity waived immunity by agreeing to participate in federal bankruptcy court proceedings in its contract for a federal loan program, we do not think that *Duke* forecloses our finding such a waiver. To the contrary, we think that KSU's affirmative entry into an agreement which explicitly subjects it to federal bankruptcy court proceedings is wholly different from the rule that the state does not waive immunity by merely agreeing to obey general federal laws in participating in a federal program. This rule, which is based on the reality that agreeing to obey federal laws does not mean agreeing to be sued in federal court, is neither violated nor diminished by our conclusion today. In this case, KSU's entry into a contract which specifically requires it to abide by 34 C.F.R. § 674 means that KSU has unequivocally subjected itself to federal bankruptcy court jurisdiction pursuant to § 674.49 for purposes of the Perkins Loan Program.

KSU raises two additional arguments regarding whether it waived immunity. First, relying on the fact that a request for discharge can be made before a federal bankruptcy court under chapters 7, 11, 12, or 13, or before a state court under chapter 11, *see Innes*, 207 B.R. at 957; 34 C.F.R. § 674.49(c)(1); *see also* 4 COLLIER ON BANKRUPTCY ¶ 523.03, at 523-17 (Lawrence P. King, ed., 15th ed. 1999) (noting that state courts may exercise jurisdiction to determine dischargeability of certain debts), KSU argues that the text of 34 C.F.R. § 674.49 does not establish unambiguously that a waiver would extend to federal bankruptcy court. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). We disagree. In KSU's contract with the DOE, KSU expressly consented to follow the requirements of 34 C.F.R. § 674, which includes

§ 674.49. As we discussed above, § 674.49 sets forth several actions to be performed by an educational institution in federal bankruptcy court. We therefore think KSU agreed to perform obligations under *both* state and federal court. Our conclusion is supported by the fact that, under the comprehensive grants of authority to federal district courts and bankruptcy courts prescribed in 28 U.S.C. §§ 1334(b) and 157(a), respectively, discharge petitions are ordinarily filed in the federal bankruptcy court.[4] See also 28 U.S.C. § 157(b)(1) & (b)(2)(I) (indicating that bankruptcy court may have jurisdiction over core proceedings such as determination of dischargeability of debt); *Brown v. Felsen*, 442 U.S. 127, 135-36 (1979) (stating that Congress granted bankruptcy courts exclusive jurisdiction to determine whether a debt is dischargeable based on the bankruptcy courts' expertise); *Schwager v. Fallas (In re Schwager)*, 121 F.3d 177, 181 (5th Cir. 1997) (noting same).

Second, KSU argues that it did not waive immunity by merely agreeing to perform certain functions before the bankruptcy court because those obligations only require it to appear and move for a dismissal under the Eleventh Amendment. This is not a reasonable interpretation of the obligations to which KSU assented by entering into the agreement with the DOE because, as explained above, 34 C.F.R. § 674.49 contemplates a number of specific obligations by which KSU is bound and which clearly require more than moving for dismissal under the Eleventh Amendment. *See* 34 C.F.R. § 674.49(b)-(e).

Therefore, we hold that KSU knowingly and voluntarily waived its Eleventh Amendment immunity by agreeing, as a prerequisite to its participation in the Perkins Loan program, to

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[4] While civil proceedings under Title 11 may proceed in another jurisdiction if the bankruptcy court abstains, *see* 28 U.S.C. § 1334(c)(1) & (2), nothing in this provision changes our determination that KSU agreed to perform certain obligations in federal court.

undertake certain enumerated actions in federal bankruptcy court in the event of a claim for discharge filed by the student-borrower.

C.

Finally, even though we have concluded that KSU waived immunity by entering into an agreement with the DOE which subjects it to the jurisdiction of the federal bankruptcy court, we must examine whether the waiver is valid. This determination is based on whether KSU had the authority to waive Eleventh Amendment immunity. *See Ford Motor Co.*, 323 U.S. at 467. We easily resolve this question by examining the enabling legislation, Kan. Stat. Ann. § 76-723. Nothing in the statute itself makes entering into a contract waiving immunity an *ultra vires* act. Indeed the contrary is true-this legislation explicitly gives KSU, as a state educational institution, expansive, unlimited authority to contract with the DOE so that KSU may participate in student financial assistance programs. Further, unlike in other Kansas statutes, there is no provision in § 76-723 disclaiming a waiver or prohibiting consent to waive. *See, e.g.*, Kan. Stat. Ann. § 75-6116(g) (stating that "[n]othing in . . . the Kansas tort claims act shall be construed as a waiver by the state of Kansas of immunity from suit under the [Eleventh] Amendment"); *id.* § 39-7,137 (stating same with respect to certain administrative proceedings for Kansas social welfare program). Accordingly, we hold that Kan. Stat. Ann. § 76-723 conferred upon KSU the power to waive Eleventh Amendment immunity.[5]

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[5] Because we have determined that KSU was authorized to waive immunity, it is not necessary to identify a specific individual at KSU who was authorized to sign the contract with the DOE. Further, Appellant has not argued that the individual who signed the contract was acting *ultra vires* or in derogation of his or her authority at the University.

## III.

In conclusion, we AFFIRM the decision of the district court for the foregoing reasons.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

| | | |
|---|---|---|
| **In Re: MARK INNES** | ) | |
| **GENEVIEVE INNES,** | ) | |
| | ) | |
| **Debtors.** | ) | |
| | ) | |
| **MARK INNES and** | ) | |
| **GENEVIEVE INNES,** | ) | |
| | ) | |
| **Plaintiffs/Appellees** | ) | **CIVIL ACTION** |
| | ) | |
| **v.** | ) | **Case No. 97-4075-DES** |
| | ) | **Bankr. No. 97-41486-13** |
| **KANSAS STATE** | ) | |
| **UNIVERSITY,** | ) | **Adv. No. 95-7104** |
| **State of Kansas** | ) | |
| **Higher Education** | ) | |
| **Assistance Foundation,** | ) | |
| | ) | |
| **Defendant/Appellant.** | ) | |
| _____ | ) | |

**MEMORANDUM AND ORDER**

This matter is before the court on appeal by defendant Kansas State University ("KSU") from the order of the Bankruptcy court filed on April 8, 1997.

## I. BACKGROUND

The plaintiffs, Mark and Genevieve Innes, filed a complaint in the United States Bankruptcy Court for the District of Kansas to determine the dischargeability of a number of student loans. They claim the loans should be dischargeable on the ground of "undue hardship," as provided by 11 U.S.C.A. § 523(a)(8)(B) and § 1328. Defendant KSU moved to dismiss

for lack of jurisdiction. KSU contends that it is immune from suit in federal court pursuant to the Eleventh Amendment to the Constitution of the United States because it is an arm of the state of Kansas. The debtors contend KSU has waived any immunity for which it might qualify. The bankruptcy court held that by agreeing to participate in the Perkins Loan program, "KSU necessarily consented to suit in a federal bankruptcy court concerning any of these matters."

The controlling facts are not disputed and most of the relevant facts underlying this dispute have been set forth in the bankruptcy court's Order denying KSU's motion to dismiss for lack of jurisdiction, No. 95-41486-13, Adversary No. 95-7104 (Bankr. D. Kan. Apr. 8, 1997). These facts are as follows: Under the authority of Kan. Stat. Ann. § 76-723, KSU entered into a written agreement (Agreement) with the United States Department of Education ("DOE") which enabled KSU to participate in student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended. The Agreement provides that participation subjects KSU to the terms and conditions set forth in the Agreement. Between 1987 and 1991, one of the debtors obtained several loans from KSU under the federal Perkins Loan Program, one of several loan programs covered by the Agreement. Perkins Loans are authorized and governed by 20 U.S.C.A. § 1087aa, *et seq.*, and 34 C.F.R. Part 674.

In general, the Perkins Loan Program provides federal funds to be administered through institutions which have made agreements with the DOE. A fund for the loans is established with a federal capital contribution; the institution must add to the fund its own contribution equal to at least one-ninth of the federal contribution. 20 U.S.C.A. § 1087cc(a)(2)(B). Collections on loans made under the program are also deposited into the fund. *Id.* The money in the fund is then available to provide loans to qualified students at the institution. KSU's Agreement states:

> The institution understands and agrees that it is subject to the program statutes and implementing regulations for each [program established under Title IV of the Higher Education Act of 1965(HEA)] in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668. The institution also agrees to comply with all the relevant program statutes and regulations governing the operation of each Title IV, HEA Program in which it participates.

In a section dealing specifically with the Perkins Loan Program, the Agreement states: "The institution agrees to perform the functions and activities set forth in 34 CFR Part 674"; "The institution agrees to exercise due diligence in the collection of loans made from the Fund in accordance with program regulations." At the conclusion of the life of the program, the federal capital contribution must be returned to the United States. 20 U.S.C.A. § 1087ff. During the life of the program, certain administrative expenses and certain losses incurred by the institution are indemnified by the United States. 20 U.S.C.A. § 1087cc(b).

## II. STANDARD OF REVIEW

28 U.S.C. § 158(a) grants the court jurisdiction to hear appeals from final orders of the bankruptcy court. The court reviews de novo the bankruptcy court's conclusions of law. *Schneider v. Nazar (In re Schneider)*, 864 F.2d 683, 685 (10th Cir. 1988). The court examines the bankruptcy court's findings of fact, however, under the "clearly erroneous" standard. *Id.* at 685.

## III. DISCUSSION

The Eleventh Amendment bars suits brought in federal court against a state or its agencies and applies whether the relief sought is legal or equitable. *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995). The parties agree that KSU, as

an arm of the state of Kansas, is entitled, absent waiver, to assert Eleventh Amendment immunity. The only issue on review, then, is whether KSU has waived this immunity. "[A]ny waiver by a State of its Eleventh Amendment immunity must be unequivocal." *Johns* 57 F.3d at 1553. Thus, a state may waive its Eleventh Amendment immunity "only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Id.* at 1553 (internal citations omitted).

KSU contends that neither Kan. Stat. Ann. § 76-723 nor its Agreement with the DOE evidences any intent to waive its Eleventh Amendment immunity. KSU cites several Supreme Court cases which establish that participation in a federal program, receipt of federal funds, or an agreement simply to recognize and abide by federal laws, regulations, and guidelines is not sufficient to waive Eleventh Amendment immunity. Plaintiffs respond that waiver of immunity need not be express, and contend that the terms of Kan. Stat. Ann. § 76-723 and the Agreement, in conjunction, leave no room for any other reasonable construction.

Kan. Stat. Ann. § 76-723, enacted in 1970, provides:

> The board of regents, or any state educational institution with the approval of the board of regents, may make and file applications for federal funds appropriated and made available by federal law for purposes related to the operation or function of such board or institution. The board of regents, or any state educational institution with the approval of the board of regents, may receive from the federal government, or any of its agencies, any funds made available under existing law, rules or regulations, or that may hereafter be made available. The board of regents, or any state educational institution with the approval of the board of regents, may expend the same in accordance with the law, and the rules, regulations and requirements under

> which such funds are made available. Such moneys shall be expended only in accordance with and for the purposes specified in federal law. Federal funds shall be deposited in the state treasury.

Kan. Stat. Ann. § 76-723 (1996). KSU argues that the statute lacks the express language or overwhelming textual implication required to constitute a waiver of immunity. At most, KSU argues, the statute merely requires KSU to comply with federal law, which is not sufficient to waive Eleventh Amendment protection. Standing alone, the statute does not appear to express the requisite intent to waive immunity. The statute, however, must not be examined independently of the Agreement it purports to authorize.

Unlike the statute, the Agreement between KSU and the DOE does more than indicate KSU's commitment to abide by federal law and regulations. It specifically identifies various regulations, including 34 C.F.R. § 674.49, "Bankruptcy of borrower," that the school will follow. In turn, 34 C.F.R. § 674.49 obligates KSU to perform certain functions that must occur in the court where the borrower has filed for bankruptcy. These functions, which are to be performed as circumstances require, include filing a proof of claim, opposing a chapter 13 repayment plan, seeking conversion or dismissal of a chapter 13 case, and opposing a requested discharge under 11 U.S.C.A. § 1328(b). As the bankruptcy court noted, the regulation also requires KSU, if the circumstances warrant, to oppose a borrower's request for a determination of dischargeability under 11 U.S.C.A. § 523(a)(8)(B). Such request can be made before either a bankruptcy court or a state court, but is ordinarily made before the bankruptcy court.

KSU suggests that because the possibility of a state court proceeding exists, the language of the regulation does not satisfy the requirement that a waiver of immunity, particularly a constructive waiver, be expressed clearly and unequivocally. The court disagrees. As a party to the Agreement with the

DOE, KSU agreed to perform its obligations in the court where its borrower has filed for bankruptcy, whether state court or federal bankruptcy court. As the bankruptcy court correctly noted, "this was not a general agreement to follow federal law and regulations, but a specific agreement, authorized by the Kansas legislature, to participate in proceedings before a federal bankruptcy court." That the regulation provides to a borrower the option of proceeding in state court does not alter the fact KSU expressly agreed to the terms of 34 C.F.R. § 674.49, which allows for proceedings in federal bankruptcy court.

The integration of the Agreement and Kan. Stat. Ann. § 76-723 creates an overwhelming implication that KSU waived its Eleventh Amendment immunity for purposes of performing those functions that must occur where its borrower has filed for bankruptcy in a federal bankruptcy court. Accordingly, the bankruptcy court's decision will be affirmed.

**IT IS THEREFORE BY THE COURT ORDERED** that the order of the bankruptcy court entered April 8, 1997, denying defendant KSU's motion to dismiss for lack of jurisdiction, is hereby affirmed.

Dated this 31st day of October, 1997, at Topeka, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS**

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|---|---|
| **In Re:** | |
| **MARK INNES,**<br>**GENEVIEVE INNES,**<br><br>**DEBTOR(S).** | **CASE NO. 95-41486-13**<br>**CHAPTER 13** |
| **MARK INNES,**<br>**GENEVIEVE INNES,**<br><br>**PLAINTIFF(S),**<br><br>**v.**<br><br>**KANSAS STATE UNIVERSITY, et al.,**<br><br>**DEFENDANT(S).** | **ADV. NO. 95-7104** |

## MEMORANDUM OF DECISION

This proceeding is before the Court on defendant Kansas State University's motion to dismiss for lack of jurisdiction. Kansas State University (KSU) is represented by Christopher F. Burger, Assistant Attorney General for the State of Kansas. The debtors are represented by Brenda J. Bell of Seaton, Miller & Bell, L.L.P., of Manhattan, Kansas. The Court has heard the arguments of counsel and considered the relevant pleadings, and is now ready to rule.

## FACTS

The debtors filed a complaint to determine the dischargeability of a number of student loans. They claim the

loans should be dischargeable on the ground of "undue hardship," as provided by 11 U.S.C.A. § 523(a)(8)(B) and § 1328. Except for the amounts owed on the loans, the facts relevant to the undue hardship issue will be the same regardless of the number of loans involved. But for a preliminary jurisdiction question raised by KSU, the case could be ready for trial on the undue hardship issue. KSU contends that it is immune from suit in federal court pursuant to the Eleventh Amendment to the Constitution of the United States because it is an arm of the State of Kansas. The debtors dispute KSU's right to claim that immunity, and alternatively, contend KSU has waived any immunity for which it might qualify.

The controlling facts are not disputed. KSU entered into a written agreement (Agreement) with the United States Department of Education (DOE) which enabled KSU to participate in student financial assistance programs authorized by title IV of the Higher Education Act of 1965, as amended. The Agreement provides that participation subjects KSU to the terms and conditions set forth in the Agreement. Between 1987 and 1991, one of the debtors obtained several loans from KSU under the Federal Perkins Loan Program, one of several loan programs covered by the Agreement. Perkins Loans are authorized and governed by 20 U.S.C.A. § 1087aa, et seq., and 34 C.F.R. Part 674.

In general, the Perkins Loan Program provides federal funds to be administered through institutions which have made agreements with the DOE. A fund for the loans is established with a federal capital contribution; the institution must add to the fund its own contribution equal to at least one-ninth of the federal contribution. *20 U.S.C.A. § 1087cc(a)(2)(B).* Collections on loans made under the program are also deposited into the fund. *Id.* The money in the fund is then available to provide loans to qualified students at the institution. KSU's Agreement states:

> The institution understands and agrees that it is subject to the program statutes and implementing regulations for each [program established under Title IV of the Higher Education Act of 1965 (HEA)] in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668. The institution also agrees to comply with all the relevant program statutes and regulations governing the operation of each Title IV, HEA Program in which it participates.

In a section dealing specifically with the Perkins Loan Program, the Agreement states: "The institution agrees to perform the functions and activities set forth in 34 CFR Part 674"; and "The institution agrees to exercise due diligence in the collection of loans made from the Fund in accordance with program regulations." At the conclusion of the life of the program, the federal capital contribution must be returned to the United States. *§ 1087ff*. During the life of the program, certain administrative expenses and certain losses incurred by the institution are indemnified by the United States. *§ 1087cc(b)*.

## DISCUSSION AND CONCLUSIONS

Except where a State has consented or Congress has constitutionally declared otherwise, the Eleventh Amendment to the United States Constitution prevents a private individual from suing the State in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S. Ct. 1114, 134 L. Ed. 2d 252, 265, 268-69 (1996). Under the "arm-of-the-state" doctrine, this immunity also extends to an entity created by a State that operates as an alter ego or instrumentality of the State. *Watson v. University of Utah Medical Center*, 75 F.3d 569, 574 (10th Cir. 1996). The Kansas Board of Regents controls KSU and the other Regents schools. Generally speaking, these schools have been determined to function as arms of the State of Kansas. *Brennan v. University of Kansas*,

451 F.2d 1287, 1290 (10th Cir. 1971) (relying on *Board of Regents v. Hamilton*, 28 Kan. 376, 378-80 (1882) and *Murray v. State Board of Regents*, 194 Kan. 686 (1965)). Consequently, they would ordinarily share the State's immunity from suit in federal court unless they have somehow waived that immunity and consented to such suits.

There can be little doubt that Congress intended to abrogate the States' Eleventh Amendment immunity when it revised 11 U.S.C.A. § 106 in 1994. Last year's Seminole Tribe decision strongly suggests the Bankruptcy Clause in Article I of the Constitution does not give Congress the power to abrogate that immunity. The question remains, however, whether the Fourteenth Amendment might have given Congress the necessary authority. No controlling case law has resolved that question for this Court, and the Court concludes it need not offer an answer in this case. Instead, the Court finds that KSU has waived any Eleventh Amendment immunity it otherwise might have by entering into the Agreement with the DOE.

KSU relies on several U.S. Supreme Court cases discussing what it takes for a State to waive its Eleventh Amendment immunity from suit in federal court. These cases clearly declare that neither participation in a federal program, receipt of federal funds, nor an agreement simply to recognize and abide by federal laws, regulations, and guidelines is sufficient to waive that immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246-47 (1985); *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (per curiam); *Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974). KSU contends nothing more is involved here.

The Court is convinced much more is involved. Since at least 1977, K.S.A. 76-723 has provided:

> The board of regents, or any state educational institution with the approval of the board of regents, may make and file applications for federal funds appropriated and made available by federal law for purposes related to the operation or function of such board or institution. The board of regents, or any state educational institution with the approval of the board of regents, may receive from the federal government, or any of its agencies, any funds made available under existing law, rules or regulations, or that may hereafter be made available. The board of regents, or any state educational institution with the approval of the board of regents, may expend the same in accordance with the law, and the rules, regulations and requirements under which such funds are made available. Such moneys shall be expended only in accordance with and for the purposes specified in federal law. Federal funds shall be deposited in the state treasury.

In this statute, the Kansas legislature authorized KSU to agree to abide by whatever federal law and regulations might govern qualifying educational programs like the Federal Perkins Loan Program. KSU's Agreement does not simply provide that it will abide by federal law and regulations, but specifically identifies various regulations, including 34 C.F.R. § 674.49, "Bankruptcy of borrower," that the school will follow.

In pertinent part, section 674.49 provides:

> (b) Proof of claim. The institution shall file a proof of claim in the bankruptcy proceeding, unless, in the case of a proceeding under Chapter 7 of the Bankruptcy Code, the notice of meeting of creditors states that the borrower has no assets.
>
> (c) Borrower's request for determination of dischargeability.

(1) The institution shall follow the procedures in this paragraph if it is properly served with a complaint in a proceeding under chapter 7, 11, 12 or 13 of the Bankruptcy Code, or under 11 U.S.C. 1328(b), for a determination of dischargeability under 11 U.S.C. 523(a)(8)(B) on the ground that repayment of the loan would impose an undue hardship on the borrower and his or her dependents.

(2) If more than seven years of the repayment period on the loan, excluding periods of deferment granted to the borrower, has passed before the borrower filed the petition for relief in bankruptcy, the institution may not oppose a determination of dischargeability requested under 11 U.S.C. 523(a)(8)(B) on the ground of undue hardship.

(3) If less than seven years of the repayment period on the loan, excluding periods of deferment granted to the borrower, has passed before the borrower filed the petition for relief, the institution shall determine, on the basis of reasonably available information, whether repayment of the loan under either the current repayment schedule or any adjusted schedule authorized under subpart B or D of this part would impose an undue hardship on the borrower and his or her dependents.

(4) If the institution concludes that repayment would not impose an undue hardship, the institution shall determine whether the costs reasonably expected to be incurred to oppose discharge will exceed one-third of the total amount owed on the loan, including principal, interest, late charges and collection costs.

(5) If the expected costs of opposing discharge of such a loan do not exceed one-third of the total amount owed on the loan, the institution shall—

(i) Oppose the borrower's request for a determination of dischargeability; and

(ii) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.

. . . .

(d) Request for determination of non-dischargeability. The institution may file a complaint for a determination that a loan obligation is not dischargeable and for judgment on the loan if the institution would have been required under paragraph (c) of this section to oppose a request for a determination of dischargeability with regard to that loan.

(e) Chapter 13 repayment plan.

(1) The institution shall follow the procedures in this paragraph in response to a repayment plan proposed by a borrower who has filed for relief under Chapter 13 of the Bankruptcy Code.

(2) The institution is not required to respond to a proposed repayment plan, if—

(i) The borrower proposes under the repayment plan to repay all principal, interest, late charges and collection costs on the loan; or

(ii) The repayment plan makes no provision with regard either to the loan obligation or to general unsecured claims.

(3) (i) If the borrower proposes under the repayment plan to repay less than the total amount owed on the loan, the institution shall determine from its own records and court documents—

(A) The amount of the loan obligation dischargeable under the plan by deducting the total payments on the loan proposed under the plan from the total amount owed;

(B) Whether the plan or the classification of the loan obligation under the proposed plan meets the requirements of section 1325 of the Code; and

(C) Whether grounds exist under 11 U.S.C. 1307 to move for conversion or dismissal of the Chapter 13 case.

(ii) If the institution reasonably expects that costs of the appropriate actions will not exceed one-third of the dischargeable loan debt, the institution shall—

(A) Object to confirmation of a proposed plan that does not meet the requirements of 11 U.S.C. 1325; and

(B) Move to dismiss or convert a case where grounds can be established under 11 U.S.C. 1307.

(4) (i) The institution shall monitor the borrower's compliance with the requirements of the plan confirmed by the court. If the institution determines that the debtor has not made the payments required under the plan, or has filed a request for a "hardship discharge" under 11 U.S.C. 1328(b), and the institution holds a loan that entered repayment status more than seven years, excluding periods of deferment, before the borrower filed the petition for relief in bankruptcy, the institution shall determine from its own records and information derived from documents filed with the court—

> (A) Whether grounds exist under 11 U.S.C. 1307 to convert or dismiss the case; and
>
> (B) Whether the borrower has demonstrated entitlement to the "hardship discharge" by meeting the requirements of 11 U.S.C. 1328(b).
>
> (ii) If the institution reasonably expects that costs of the appropriate actions, when added to the costs already incurred in taking actions authorized under this section, will not exceed one-third of the dischargeable loan debt, the institution shall—
>
> (A) Move to dismiss or convert a case where grounds can be established under 11 U.S.C. 1307; or
>
> (B) Oppose the requested discharge where the debtor has not demonstrated that the requirements of 11 U.S.C. 1328(b) are met.

34 C.F.R. § 674.49 (1996).[1] This regulation requires KSU to perform various tasks that can take place only in the bankruptcy court where KSU's borrower has filed for bankruptcy. These tasks include filing a proof of claim in an appropriate case, opposing a chapter 13 repayment plan under certain circumstances, seeking conversion or dismissal of a chapter 13 case under certain circumstances, and opposing a requested discharge under 11 U.S.C.A. § 1328(b). The regulation also requires KSU, if the circumstances warrant, to oppose a borrower's request for a determination of dischargeability under § 523(a)(8)(B), a request that can be made before either a bankruptcy court or a state court, but is

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[1] In all respects relevant to this case, this regulation has remained the same since at least November 30, 1987. See 52 Fed. Reg. 45552, 4560-61 (1987) (adopting revised § 674.49).

ordinarily made before the bankruptcy court. By agreeing to this regulation, KSU necessarily consented to suit in a federal bankruptcy court concerning any of these matters. This was not a general agreement to follow federal law and regulations, but a specific agreement, authorized by the Kansas legislature, to participate in proceedings before a federal bankruptcy court. The Court concludes KSU's motion to dismiss should be overruled.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this 8 day of April, 1997.

/s/ James A. Pusateri
JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| **In re: MARK INNES and GENEVIEVE INNES.** | |
| **Debtors.** | |
| **MARK INNES and GENEVIEVE INNES,** | |
| **Plaintiffs - Appellees,** | |
| **v.** | **No. 97-3363** |
| **KANSAS STATE UNIVERSITY, State of Kansas Higher Education Assistance Foundation,** | |
| **Defendant - Appellant.** | |

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ORDER

Filed September 20, 1999

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Before **KELLY, McKAY,** and **LUCERO**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /L. Balano/
Deputy Clerk

**DEPARTMENT OF EDUCATION [SEAL]**
**OFFICE OF POSTSECONDARY EDUCATION OFFICE OF STUDENT FINANCIAL ASSISTANCE**

## PROGRAM PARTICIPATION AGREEMENT

Name of Institution [Kansas State University]

Address of Institution [104 Fairchild Hall,]

[Manhattan, Kansas 6506]

Office of Postsecondary Education Identification Number

[001928 1480771751A1]

The postsecondary educational Institution listed above, referred to hereafter as the "Institution," and the United States Secretary of Education, referred to hereafter as the "Secretary," agree that the Institution may participate in those student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs) indicated under Article I of this Agreement and further agree the such participation is subject to the terms and conditions set forth in Articles II, IX, and such other relevant Articles of this Agreement.

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The education of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA Program.

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## ARTICLE I. SCOPE OF COVERAGE

This Agreement covers the Institution's eligibility to participate in each of the following checked Title IV, HEA Programs. It also applies to all allocations of the Institution as stated on the most current notice of eligibility issued by the Department.

☒ **PELL GRANT (PG) PROGRAM***
20 U.S.C. 1070a et seq; 34 CFR Part 690.

**GUARANTEED STUDENT LOAN (GSL) PROGRAM****

☒ **STAFFORD LOAN PROGRAM**
20 U.S.C. 1071 et seq; 34 CFR Part 682.

☒ **PLUS PROGRAM**
20 U.S.C. 1078-2; 34 CFR Part 682.

☒ **SUPPLEMENTAL LOANS FOR STUDENTS (SLS) PROGRAM**
20 U.S.C. 1078-1; 34 CFR Part 682.

☐ **PERKINS LOAN (PL) PROGRAM*****
20 U.S.C. 1087aa et seq; 34 CFR Part 674.

☒ **SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT (SEOG) PROGRAM**
20 U.S.C. 1070b et seq; 34 CFR Part 676.

☒ **COLLEGE WORK-STUDY (CSW) PROGRAM**
42 U.S.C. 2751 et seq; 34 CFR Part 675 Subpart A.

☐ **JOB LOCATION AND DEVELOPMENT (JLD) PROGRAM**
42 U.S.C. 2756; 34 CFR Part 675 Subpart B.

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* The Pell Grant Program was previously called the Basic Educational Opportunity Grant Program.

** The Guaranteed Student Loan Program is the inclusive term used to describe the Stafford, PLUS and SLS Programs.

*** The Perkins Loan program was previously called the National Direct Student Loan program, which in turn was a continuation of the National Defense Student Loan Program authorized by Title II of the National Defense Education Act of 1958, as amended (20 U.S.C. 421-429).

☐ **WORK STUDY FOR COMMUNITY SERVICE LEARNING PROGRAM**
42 U.S.C. 2756a; 34 CFR Part 675 Subpart A.

☐ **PRIVATE SECTOR EMPLOYMENT**
42 U.S.C. 2751 et seq; 34 CFR Part 675 Subpart A.

## ARTICLE II. GENERAL PROVISIONS

1. The Institution understands and agrees that it is subject to the program statutes and implementing regulations for each Title IV, HEA program in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA, and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668. The Institution further agrees to comply with all the relevant program statutes and regulations governing the operation of each Title IV, HEA Program in which it participates.

2. The Institution agrees to use the funds provided to it in advance or by way of reimbursement under any Title IV, HEA Program, plus any interest or other income earned on those funds, only in accordance with the statutes, regulations, and the Department's Recipient's Guide —Payment Management Systems pertaining to that program. The Institution further agrees that it is responsible for accounting, with appropriate documentation, for all the Title IV, HEA Program funds it receives and the interest or other income earned on those funds, and for returning to the Secretary any funds for which it cannot properly account.

3. The Institution agrees not to charge any student a fee for processing or handling any application, form or data required to determine the student's eligibility for assistance under any Title IV, HEA Program or the amount of such assistance, or for completing or handling the Federal Student Assistance Report provided for in Section 483(f) of the HEA.

4. If the Institution advertises job placement rates as a means of attracting students for enrollment, the Institution agrees that it will make available to prospective students, at or before the time of application, the most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of its advertisements.

5. a. The Institution certifies that on the date it executes this Agreement, it has a drug abuse prevention program in operation that it has determined is accessible to any officer, employee, or student at the Institution.

   b. The Institution certifies that on the date it executes this agreement, it is in compliance with the disclosure requirements of Section 485(f) of the HEA (Campus Security Policy and Crime Statistics).

6. a. The Secretary agrees that the Institution may receive an administrative cost allowance pursuant to Section 489 of the HEA for the PG, SEOG, CSW, and PL Programs.

   b. The Institution agrees to use the administrative cost allowance to pay the costs of administering the Title IV, HEA Programs. The Secretary and the Institution agree that the costs of carrying out the Student Consumer Information Services activities are part of the costs of carrying out Title IV, HEA Programs.

7. The Institution agrees to comply with—

   a. Title IV of the Civil Rights Act of 1964, as amended, and the implementing regulations 34 CFR Parts 100 and 101 (barring discrimination on the basis of race, color or national origin);

b. Title IX of the Education Amendments of 1972 and the implementing regulations 34 CFR Part 106 (barring discrimination on the basis of sex);

c. The Family Rights and Privacy Act of 1974 and the implementing regulations 34 CFR Part 99.

d. Section 504 of the Rehabilitation Act of 1973 and the implementing regulations 34 CFR Part 104 (barring discrimination on the basis of physical handicap); and

e. The Age Discrimination Act of 1975 and the implementing regulations 45 CFR Part 90.

8. If an Institution's students receive financial assistance pursuant to Section 484(d), i.e., by passing an examination approved by the Secretary, the Institution agrees to make available to such students a program proven successful in assisting students in obtaining a certificate of high school equivalency.

* * *

## ARTICLE V. PERKINS LOAN--SPECIFIC PROVISIONS

The Institution agrees to perform the functions and activities set forth in 34 CFR Part 674. The functions and activities the Institution agrees to perform include, but are not limited to:

1. The Institution agrees to establish and maintain a Perkins Loan Fund (Fund) for the purpose of making loans to eligible students. Any student loan fund established under Section 204 of Title II of the National Defense Education Act of 1958, as amended, is considered established under Section 463 of Title IV, Part E, of the Higher Education Act of 1965, as amended. Any asset of that fund is considered to be an asset of the fund established under this Article.

2. The Institution agrees to deposit promptly in the Fund:

   a. Federal Capital Contributions appropriated under Section 461 of the Act and received by the Institution;

   b. Institutional Capital Contribution, i.e., an amount from its own funds, equal to not less than one-ninth of the Federal Capital Contribution;

   c. Collections of principal and interest on loans made from the Fund;

   d. Late charges and other expenses;

   e. Payments made to the Institution by the Secretary as a result of cancellations of loans made after June 30, 1972 (Direct or Perkins Loans);

   f. Any other earnings, including interest, of the Fund;

   g. Short-term, no-interest loans made by the Institution to the Fund in anticipation of collections; and

   h. Payments made to the Institution by the Secretary as a result of referrals of defaulted loans.

3. The Institution agrees to use the fund only for—

   a. Loans to students in accordance with the program regulations;

   b. Administrative costs in accordance with paragraph 6.b. of Article II. of this Agreement;

   c. Costs of litigation and other collection costs as specified in the program regulations;

   d. Capital distributions as provided in Section 466 of the HEA; and

   e. Repayments to the Institution of the short-term, no-interest loans made to the Fund by the Institution in anticipation of collections.

4. The Institution agrees to exercise due diligence in the collection of loans made from the Fund in accordance with program regulations. If a loan has been in default despite the Institution's exercise of due diligence, the Institution may assign, without recompense, its rights to the note to the United States Government.

5. The Institution agrees to submit a report to the Secretary on at least a semi-annual basis indicating the total number of loans made from its Fund which are in default for 120 days for loans repayable in monthly installments or for 180 days for loans repayable in less frequent installments.

6. The Secretary agrees to provide to the Institution any information with respect to the names and addresses of borrowers or other relevant information which is available to the Secretary.

7. The Institution agrees to provide student borrowers with the loan information specified in Section 463A of the HEA and in the Perkins Loan Program Regulations.

8. The Institution agrees that where a note or written agreement evidencing a loan has been in default despite its due diligence, if the Institution knowingly fails to maintain an acceptable collection record on the loan, the Secretary may require the Institution to assign the note to the Secretary and the Secretary may take such action as is set forth in Section 463(a)(5) of the HEA.

9. The Institution agrees that if it determines not to service and collect Perkins Loans it will assign such loans to the Secretary for repayment in accordance with Section 463(a)(6) of the HEA.

10. The Institution agrees that it will make Perkins Loans first to students with exceptional need.

* * *

## ARTICLE XI. SIGNATORIES

As Chief Executive Officer of the Institution, I agree that the Institution and its representatives shall comply with the provisions of this agreement and with the statutes and regulations governing those Title IV, HEA Programs in which the Institution participates.

Signature of Chief Executive Officer /s/ Timothy R. Donoghue

Print Name and Title
[Timothy R. Donoghue, Vice Provost for Research, for Jon Wefald, President]

Date [August 26, 1991]

For the Secretary, U.S. Department of Education /s/ Carol F. Sperry

Date [Nov. 25, 1992]

## 34 CFR 674.49

**§ 674.49 Bankruptcy of borrower.**

(a) General. If an institution receives notice that a borrower has filed a petition for relief in bankruptcy, usually by receiving a notice of meeting of creditors, the institution and its agents shall immediately suspend any collection efforts outside the bankruptcy proceeding against the borrower.

(b) Proof of claim. The institution shall file a proof of claim in the bankruptcy proceeding, unless, in the case of a proceeding under chapter 7 of the Bankruptcy Code, the notice of meeting of creditors states that the borrower has no assets.

(c) Borrower's request for determination of dischargeability.

(1) The institution shall follow the procedures in this paragraph if it is properly served with a complaint in a proceeding under chapter 7, 11, 12, or 13 of the Bankruptcy Code, or under 11 U.S.C. 1328(b), for a determination of dischargeability under 11 U.S.C. 523(a)(8)(B) on the ground that repayment of the loan would impose an undue hardship on the borrower and his or her dependents.

(2) If more than seven years of the repayment period on the loan, excluding periods of deferment granted to the borrower, has passed before the borrower filed the petition for relief in bankruptcy, the institution may not oppose a determination of dischargeability requested under 11 U.S.C. 523(a)(8)(B) on the ground of undue hardship.

(3) If less than seven years of the repayment period on the loan, excluding periods of deferment granted to the borrower, has passed before the borrower filed the petition for relief, the institution shall determine, on the basis of reasonably available information, whether repayment of the loan under either the current repayment schedule or any adjusted schedule

authorized under subpart B or D of this part would impose an undue hardship on the borrower and his or her dependents.

(4) If the institution concludes that repayment would not impose an undue hardship, the institution shall determine whether the costs reasonably expected to be incurred to oppose discharge will exceed one-third of the total amount owed on the loan, including principal, interest, late charges and collection costs.

(5) If the expected costs of opposing discharge of such a loan do not exceed one-third of the total amount owed on the loan, the institution shall—

(i) Oppose the borrower's request for a determination of dischargeability; and

(ii) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.

(6) In opposing a request for a determination of dischargeability, the institution may compromise a portion of the amount owed on the loan if it reasonably determines that the compromise is necessary in order to obtain a judgment on the loan.

(d) Request for determination of non-dischargeability. The institution may file a complaint for a determination that a loan obligation is not dischargeable and for judgment on the loan if the institution would have been required under paragraph (c) of this section to oppose a request for a determination of dischargeability with regard to that loan.

(e) Chapter 13 repayment plan. (1) The institution shall follow the procedures in this paragraph in response to a repayment plan proposed by a borrower who has filed for relief under chapter 13 of the Bankruptcy Code.

(2) The institution is not required to respond to a proposed repayment plan, if—

(i) The borrower proposes under the repayment plan to repay all principal, interest, late charges and collection costs on the loan; or

(ii) The repayment plan makes no provision with regard either to the loan obligation or to general unsecured claims.

(3)(i) If the borrower proposes under the repayment plan to repay less than the total amount owed on the loan, the institution shall determine from its own records and court documents—

(A) The amount of the loan obligation dischargeable under the plan by deducting the total payments on the loan proposed under the plan from the total amount owed;

(B) Whether the plan or the classification of the loan obligation under the proposed plan meets the requirements of section 1325 of the Code; and

(C) Whether grounds exist under 11 U.S.C. 1307 to move for conversion or dismissal of the chapter 13 case.

(ii) If the institution reasonably expects that costs of the appropriate actions will not exceed one-third of the dischargeable loan debt, the institution shall—

(A) Object to confirmation of a proposed plan that does not meet the requirements of 11 U.S.C. 1325; and

(B) Move to dismiss or convert a case where grounds can be established under 11 U.S.C. 1307.

(4)(i) The institution shall monitor the borrower's compliance with the requirements of the plan confirmed by the court. If the institution determines that the debtor has not made the payments required under the plan, or has filed a request for a "hardship discharge" under 11 U.S.C. 1328(b), and the institution holds a loan that entered repayment status more than seven years, excluding periods of deferment, before the borrower filed the petition for relief in bankruptcy, the

institution shall determine from its own records and information derived from documents filed with the court—

(A) Whether grounds exist under 11 U.S.C. 1307 to convert or dismiss the case; and

(B) Whether the borrower has demonstrated entitlement to the "hardship discharge" by meeting the requirements of 11 U.S.C. 1328(b).

(ii) If the institution reasonably expects that costs of the appropriate actions, when added to the costs already incurred in taking actions authorized under this section, will not exceed one-third of the dischargeable loan debt, the institution shall—

(A) Move to dismiss or convert a case where grounds can be established under 11 U.S.C. 1307; or

(B) Oppose the requested discharge where the debtor has not demonstrated that the requirements of 11 U.S.C. 1328(b) are met.

(f) Resumption of collection from the borrower. The institution shall resume billing and collection action prescribed in this subpart after—

(1) The borrower's petition for relief in bankruptcy has been dismissed;

(2) The borrower has received a discharge under 11 U.S.C. 727, 11 U.S.C. 1141, or 11 U.S.C. 1228, unless—

(i) The court has found that repayment of the loan would impose an undue hardship on the borrower and the dependents of the borrower; or

(ii)(A) The loan entered the repayment period more than seven years, excluding periods of deferment, before the filing of the petition; and

(B) The loan is not excepted from discharge under other applicable provisions of the Code; or

(3) The borrower has received a discharge under 11 U.S.C. 1328(a) or 1328(b), unless—

(i) The court has found that repayment of the loan would impose an undue hardship on the borrower and the dependents of the borrower; or

(ii)(A) The loan entered the repayment period more than seven years, excluding periods of deferment, before the filing of the petition, and

(B) The borrower's plan approved in the bankruptcy proceeding made some provision with regard to either the loan obligation or unsecured debts in general.

(g) Termination of collection and write-off. (1) An institution shall terminate all collection action and write off a loan if it receives—

(i) A general order of discharge on a borrower owing a student loan obligation which entered the repayment period more than seven years, exclusive of periods of deferment, from the date on which a petition for relief under chapter 7, 11 or 12 of the Bankruptcy Code was filed; or

(ii) A judgment that repayment of the debt would constitute an undue hardship, and that the debt is therefore dischargeable.

(iii) A judgment that repayment of the debt would constitute an undue hardship, and that the debt is therefore dischargeable.

(2) If an institution receives a repayment from a borrower after a loan has been discharged, it shall deposit that payment in its Fund.

(Approved by the Office of Management and Budget under control number 1840-0581)

Supreme Court, U.S.
FILED
FEB 2 2 2000
CLERK

(2)

No. 99-1048

In The

# Supreme Court of the United States

KANSAS STATE UNIVERSITY,

*Petitioner,*

v.

MARK AND GENEVIEVE INNES,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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## RESPONDENTS' OBJECTION TO QUESTIONS PRESENTED IN PETITIONER'S PETITION

The Respondents, according to Rule 15.2, object to Petitioner's questions presented. The questions presented are:

i. Did the Tenth Circuit err when it determined that, on the facts of this case, a general state statute coupled with a voluntary and consensual agreement between the Kansas Board of Regents and U.S.D.O.E. was a waiver of Eleventh Amendment immunity?

ii. Did the Tenth Circuit find for the Respondents on grounds of abrogation principles or on grounds of express and unequivocal intent to litigate in federal court?

iii. Did the Tenth Circuit find a constructive waiver of Eleventh Amendment immunity based on the combination of a general state statute coupled with a voluntary and consensual agreement between the Kansas Board of Regents and U.S.D.O.E.?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

REASONS TO DENY THE WRIT ..... 1

I. The Tenth Circuit rendered a decision in accord with the decisions of this Court when it held that the State of Kansas through its arm and *alter ego* – the Kansas Board of Regents – waived Eleventh Amendment Immunity in this case... 1

II. The Tenth Circuit's Decision in this Case Does Not Conflict with This Court's Decisions Requiring Express and Unequivocal Waiver by the State ..... 6

III. The Tenth Circuit's Decision Did Not Rely on Constructive Waiver ..... 8

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

Page

CASES

*Atascadero, State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) ..... 5

*Beers v. Arkansas*, 20 HOW 527, 15 L.Ed. 991 (1858) ..... 9

*Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975) ..... 2

*College Savings Bank v. Florida Pre-Paid Post Secondary Education Expense Board*, 144 L.Ed. 2d 605, 119 S.Ct. 2119 (1999) .....8, 9

*Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945)..... 1, 2, 5

*Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944) ..... 9

*Gunter v. Atlantic Coast Line*, 200 U.S. 273 (1906) ..... 9

*Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992) ..... 4

*Magnolia Venture Capital v. Prudential Sec.*, 151 F.3d 439 (5th Cir. 1998)..... 3

*Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 (1964)..... 6, 8, 9

*Port-Authority Trans-Hudson Corp. v. Feeney*, 495 U.S 299 (1990)..... 7

*Porter v. State of Illinois*, 36 F.3d 684 (7th Cir. 1994) ..... 5

*Rose v. U.S.D.O.E.*, 187 F.3d 926 (8th Cir. 1999)..... 3

*Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995).....6, 7

TABLE OF AUTHORITIES – Continued

Page

*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) ..... 7, 8

*Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986) ..... 5

*Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974) ..... 5

STATUTES AND REGULATIONS

Kan. Stat. Art. VI § 3 ..... 1a

Kan. Stat. Ann. § 39-7, 137 ..... 2

Kan. Stat. Ann. § 75-611(g) ..... 2

Kan. Stat. Ann. § 76-723 ..... 2

Kan. Stat. Ann. § 76-721 ..... 2

11 U.S.C. § 106(b) ..... 3, 7, 8

34 C.F.R. § 674 ..... 6

## REASONS TO DENY THE WRIT

### I. The Tenth Circuit rendered a decision in accord with the decisions of this Court when it held that the State of Kansas through its arm and *alter ego* – the Kansas Board of Regents – waived Eleventh Amendment Immunity in this case.

Petitioner argues that the Tenth Circuit's decision in this case is contrary to *Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945), Pet. at 8. The Petitioner's argument is flawed because it ignores the analysis in *Ford* of the Indiana *general policy of the law*, Constitution, statutes and decisions when compared to the applicable Kansas general policy of the law, Constitution, statutes and decisions. *Ford* at 467. The Kansas general policy of law, Constitution, statutes and decisions are distinct from those analyzed in *Ford*.

In *Ford*, the Court reasoned, *ibid.*, that because the question whether the Attorney General had authority to waive immunity had not been determined by the Indiana court, the method of analysis used would be to "*rely on the general policy* of the state by looking at its Constitution, statutes and decisions." *Ibid.* (emphasis added) The Indiana Constitution contained a *prohibition* against *specific* waivers of immunity and allowed only a general waiver. Because the suit at issue in *Ford* required a specific waiver, and because the Indiana Attorney General had only statutory duties as opposed to common law duties, this court found no express waiver. *Id.* at 469. In the Kansas Constitution, no *prohibition* against any type of waiver of immunity exists. By inference from *Ford*, the absence of a specific prohibition was interpreted as a grant of authority for specific waiver. Pet. App. 16a.

The Tenth Circuit properly recognized the Kansas practice of addressing the Eleventh Amendment in the context of the general policy of law and specific statutes such as K.S.A. 75-611(g) and K.S.A. 39-7, 137 and logically compared that practice to the absence of a prohibition in K.S.A. 76-723.

A review of the establishment and grant(s) of authority to the Kansas State Board of Regents demonstrates that the general policy of Kansas grants broad authority and control to the Board. Establishment of the Board of Regents is mandated by the Kansas Constitution, with a broad grant of authority to control and supervise public institutions of higher education such as Kansas State University. Resp. App. 1. The Board has the *constitutional* duty to "perform such other duties as may be prescribed by law." *Ibid.* In one Kansas decision, the Kansas Supreme Court addressed the issue whether the Board's authority was statutory only, or if it had common law authority, and found common law authority. *Brown v. Wichita State University,* 217 Kan. 279, 540 P.2d 66 (1975) In *Brown,* Wichita State University was sued in tort by an individual, and it asserted that a contract, entered into by its agent, was invalid because it exceeded the *Board's* contracting authority set forth in K.S.A. 76-721. The Kansas Supreme Court held the contract valid on grounds that the University had broad authority and that the contracting procedure set forth in K.S.A. 76-721 was only directory, not mandatory. *Id.* at 289-290. Unlike the Attorney General in *Ford,* the Kansas Board of Regents is not restricted solely to its statutory duties. *Ibid.*

Petitioner argues that the Fifth Circuit's decision in *Magnolia* would stand in conflict with this case if the writ

is denied. Pet. at 8. The Petitioner's argument is flawed because it ignores the findings and facts of *Magnolia Venture Capital v. Prudential Sec.*, 151 F.3d 439 (5th Cir. 1998). In *Magnolia*, there was a state statute restricting venue to Hinds County, Mississippi. *Id.* at 442.

The Eighth Circuit decision in *Rose v. U.S.D.O.E.*, 187 F.3d 926 (8th Cir. 1999) indicates that the Eighth Circuit has found waiver in the area of bankruptcy jurisdiction by affirmative conduct. In *Rose*, the State, by its agency, filed a proof of claim in a debtor's bankruptcy action and the debtor argued waiver under the provisions of 11 U.S.C. § 106(b). The *Rose* decision is post-*Seminole* and the Eighth Circuit reasoned *that as a matter of common law*, and not according to 11 U.S.C. § 106(b), the State waived its immunity. *Id.* at 929. The Eighth Circuit, in *Rose*, expressed its view that issues of bankruptcy jurisdiction are unique. *Id.* at 930, n.8.[1]

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[1] "We note in passing, however, that bankruptcy has long been considered a special area of the law, and the Supreme Court's June 1999 rulings on sovereign immunity have not resolved how far Congressional power extends in the bankruptcy context. Federal jurisdiction over a bankruptcy estate differs from jurisdiction over a party to litigation. "A federal court's jurisdiction over the dischargeability of debt . . . 'derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates.' " *Virginia ex rel. Norfolk v. Collins (In re: Collins)*, 173 F.3d 924, 929 (4th Cir. 1999) (citation omitted). The Supreme Court has distinguished the adjudication of a bankruptcy estate in which a state claims an interest from an ordinary suit against a state:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the

In *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), the Eighth Circuit found waiver by the Missouri Attorney General through conduct. In *Hankins*, the State argued that no express or implied authority existed in Missouri law to allow the waiver, and that only the legislature of Missouri could waive immunity. *Id.* at 855. The Eighth Circuit found waiver because, as here, the enabling statute at issue contained no prohibition against waiver. *Id.* at 857. The Eighth Circuit in *Hankins* disregarded the argument that the State Attorney General had no authority to waive immunity. The Eighth Circuit concluded that the Attorney General acted according to statutory authority and that although the Missouri legislature *expressly* declared that the statutes governing the State Legal Defense Fund did not waive immunity defense(s), it

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> consequence of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is shortly speaking, an adjudication of interests in a *res*.
>
> *Gardner v. New Jersey*, 329 U.S. at 573-74, 67 S.Ct. 467 (citation omitted). Requirements of a workable bankruptcy system may also be seen to favor a centralized system. The Court has long recognized "orderly and expeditious proceedings" as a "fundamental purpose of the Bankruptcy Act," and the fragmentation of proceedings necessary to settle claims against a bankruptcy estate desserves that purpose. *Id.* at 574, 67 S.Ct. 467 (citation and internal quotations omitted)."

*included no such language* in the *Missouri Incarceration Reimbursement Act*. *Id.* at 859.

Petitioner argues that the Seventh Circuit decision in *Porter v. State of Illinois*, 36 F.3d 684 (7th Cir. 1994) conflicts with the decision in this case. Yet in *Porter* a state statute prohibited the waiver. *Id.* at 691. The Seventh Circuit recognized as valid the holding of *Atascadero* that immunity could be waived by the *"context of a particular federal program." Id.* at 690, *citing Atascadero, State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1, 105 S.Ct. 3142, 3145 n.1, 87 L.Ed.2d 171 (1985), and relied on *Ford*. *Id.* at 690. In *Porter*, the Seventh Circuit, like the Tenth Circuit, recognized the *Atascadero* waiver of immunity in the context of a particular federal program as a valid waiver. *Id.*

In *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), the Court found waiver *by the state's Attorney General* when he made certain representations in *litigation* which indicated that he intended to pay certain amounts if the district court awarded judgment. The waiver in *Vargas* did not come from the text of the Illinois Constitution, state statutes or decisions, and was found regardless of the state's prohibition, in statute, against waiver. *Id.* at 492. Further, the waiver was made by an *agent* of the state, not by the legislature or courts.

Finally, the Eleventh Circuit decision in *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986) is a case where a prohibition against waiver existed in an Alabama decision. *Id.* at 1214. The Tenth Circuit's decision does not offend *Ford*, or any circuit decision cited by Petitioners in Section I of their Petition. Pet. at pp. 7-10. The writ should be denied.

## II. The Tenth Circuit's Decision in this Case Does Not Conflict with This Court's Decisions Requiring Express and Unequivocal Waiver by the State.

The Tenth Circuit did not find abrogation or constructive consent by the state. Rather, the Tenth Circuit found that the state of Kansas effectuated a valid waiver of its constitutional immunity by its affirmative conduct, similar to the waiver recognized when a state participates in litigation, or files a proof of claim. Pet. App. 12a-14a, 16a-17a. The Tenth Circuit stated that:

> " . . . [w]hile this case does not present the exact language, it does contain what the language must impart – the State plainly must be on notice that by electing to participate in this federally funded program, it accepts affirmative obligations to pursue or defend claims in federal court on the merits." Pet. App. 13a.

The Tenth Circuit, in this case, was not considering whether Congress unequivocally expressed abrogation, or applied the *Parden* doctrine of constructive consent, but whether the State of Kansas had given unequivocal consent to suit in Federal Court. *See, Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 (1964). Express consent is first set forth in the contract of the parties which explicitly states that KSU agrees to *perform* the functions and activities set forth in 34 C.F.R. § 674. Pet. App. 12a.

After this case was decided by the Tenth Circuit, the Eighth Circuit handed down *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995). In *Rosebud*, an Indian Tribe entered a contract to arbitrate and then attempted to rely on Eleventh Amendment immunity to

escape the consequences of the contract when the award in arbitration was confirmed by a federal court. The Eighth Circuit found that *the contract* expressed an unequivocal intent to waive immunity by the agreement to arbitrate. *Id.* at 562.

Petitioner's overly strict interpretation of the method used by the court to analyze Eleventh Amendment waiver confuses the strict standard of waiver with an overly strict method of analysis. Such a strict method of analysis has not been the method used by this court. *See, Port-Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (disapproving a strict method of finding non-waiver because the waiver was stated in the *venue* section of the State statute). Because this is not an abrogation case, but one of waiver by unequivocal consent, the Tenth Circuit's decision did not address whether *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) was applicable. Pet. App. 4a n.1.[2]

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[2] "Because neither the bankruptcy court nor the district court relied on § 106(b) of the Bankruptcy Code, we do not address in this case whether it is constitutional. *See, e.g., Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 243-45 (3d Cir. 1998) (holding 11 U.S.C. § 106(a) unconstitutional to the extent that it purports to abrogate Eleventh Amendment immunity); *Department of Transp. & Dev. v. PNL Asset Management Co. (In re Estate of Fernandez)*, 123 F.3d 241, 244-46 (5th Cir.) (holding attempted statutory waiver of sovereign immunity under § 106(a) unconstitutional and listing similar cases), *amended by* 130 F.3d 1138 (5th Cir. 1997); *cf. Schlossberg v. Maryland (In re Creative Goldsmiths of Wash., D.C., Inc.)*, 119 F.3d 1140, 1147 (4th Cir. 1997) (holding that § 106(a) & (b) offend the Eleventh Amendment), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1517 (1998). *But cf. Wyoming Dep't of Transp. v. Straight (In re Straight)*, 143 F.3d 1387, 1392

The Petitioner would have this court construe *Seminole* so that even if a state voluntarily and knowingly enters a contract agreeing to litigate in federal court, nevertheless *Seminole* invalidates that contract. Such is simply not the law, because while *Seminole* held that Congress cannot abrogate a State's immunity – *unilaterally* in Article I – it did not abolish the concept of express or unequivocal waiver by the State through a showing of its affirmative intention to litigate in federal court. *See, Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

## III. The Tenth Circuit's Decision Did Not Rely on Constructive Waiver.

Petitioner argues that the Tenth Circuit's decision in this case controvenes the holding in *College Savings Bank v. Florida Pre-Paid Post Secondary Education Expense Board*, 144 L.Ed. 2d 605, 119 S.Ct. 2119 (1999) which overturned *Parden. Id.* at 184.

As stated, *supra*, in Section II of this brief, the Tenth Circuit's decision is not founded on Congress' unilateral imposition of federal law in an area where it cannot validly abrogate. *Parden* is a constructive consent case arising from principles of abrogation. In *Parden*, the individual plaintiffs sued the State for injuries arising from work on a state owned railroad. The applicable federal law, in *Parden*, was FELA which is enacted under the Commerce Clause. In *Parden*, no contract existed and no

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(10th Cir. 1998) (holding that 11 U.S.C. § 106(b) is unaffected by *Seminole Tribe*), *cert. denied*, ___ U.S. ___, 119 S.Ct. 446 (1998)."

affirmative consensual act existed to indicate the State's intention to litigate in federal court. The state's consent could be constructed by a reference to common carriers in interstate commerce. *Id.* at 242. The *Parden* facts are a "far cry" from the facts at hand because no affirmative action of the state served as the basis to "construct" the consent. *Id.*

*College Savings* was decided in 1999, and the federal law at issue was a 1946 law prohibiting false advertising enacted under Article I power. This Court in *College Savings* reaffirmed that the state could still voluntarily waive immunity, relying on *Gunter v. Atlantic Coast Line*, 200 U.S. 273, 284 (1906), *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944), and *Beers v. Arkansas*, 20 HOW 527, 529, 15 L.Ed. 991 (1858) ("we have held that a state may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending lawsuit.") *College, Id.* at 616.

In *College*, the *Parden Constructive Consent Doctrine* was overruled because it required an assumption that simply because a state was in a certain field, also occupied by the federal government, it had waived immunity. *Id.* at 618. *Parden* has no applicability to this case.

## CONCLUSION

For the foregoing reasons, Respondents Mark and Genevieve Innes respectfully request that this Court deny *Certiorari*.

Respectfully submitted,

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**KS Const. Art. VI, § 3**

(a) There shall be ten members of the state board of education with overlapping terms as the legislature may prescribe. The legislature shall make provision for ten member districts, each comprised of four contiguous senatorial districts. The electors of each member district shall elect one person residing in the district as a member of the board. The legislature shall prescribe the manner in which vacancies occurring on the board shall be filled.

(b) The state board of regents shall have nine members with overlapping terms as the legislature may prescribe. Members shall be appointed by the governor, subject to confirmation by the senate. One member shall be appointed from each congressional district with the remaining members appointed at large, however, no two members shall reside in the same county at the time of their appointment. Vacancies occurring on the board shall be filled by appointment by the governor as provided by law.

(c) Subsequent redistricting shall not disqualify any member of either board from service for the remainder of his term. Any member of either board may be removed from office for cause as may be provided by law.

(3)

Supreme Court, U.S.
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No. 99-1048

# In the Supreme Court of the United States

KANSAS STATE UNIVERSITY,
*Petitioner*,

v.

MARK AND GENEVIEVE INNES,
*Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

## *AMICUS CURIAE* BRIEF OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, ILLINOIS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

Interest of Amici Curiae ..... 1

Summary of Argument ..... 2

Argument ..... 3

I. Congress May Not Require an Implicit Waiver of Eleventh Amendment Immunity Under the Spending Clause Without Clear Notice of Its Intent. ..... 3

II. The Statute Governing the Perkins Student Loan Program Is Silent with Respect to Any Waiver of Eleventh Amendment Immunity by States Participating in the Program. ..... 4

III. The Tenth Circuit's Faulty Analysis Creates the Potential for Broad Misapplication in Many Important Areas of Federal-State Relations. ..... 8

Conclusion ..... 19

## TABLE OF AUTHORITIES

**Cases:**

*Alden v. Maine*, 119 S.Ct. 2240 (1999) ..... 3, 12,18
*Amos v. Maryland Dep't of Public Safety and Correctional Services*, 178 F.3d 212 (CA4 1999) ..... 10
*Amos v. Maryland*, 126 F.3d 589 (CA4 1997) ..... 10
*Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) ..... 4
*Brown v. Felsen*, 442 U.S. 127 (1979) ..... 6
*Burnette v. Carothers*, 192 F.3d 52, 57 (CA2 1999) .. 18
*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219 (1999) ..... 1, 11
*Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661 (1999) ..... 4, 9, 10, 16
*DeKalb County v. Platter (In re Platter)*, 140 F.3d 676 (CA7 1998) ..... 13
*Florida Dep't of Health & Rehabilitation Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) ..... 14
*Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985) ..... 11, 19
*Gardner v. New Jersey*, 329 U.S. 565 (1947) ..... 13
*Georgia Department of Revenue v. Burke (In re Burke)*,146 F.3d 1313 (CA11. 1998) ..... 12
*Gregory v. Ashcroft*, 501 U.S. 452 (1985) ..... 11
*Litman v. George Mason University*, 186 F.3d 544, 553 (CA4 1999) ..... 9
*Macy v. Macy*, 714 P.2d 744 (Wyo. 1986) ..... 7

*Massachusetts Higher Educ. Assistance Corp. v. Taylor*, 459 N.E.2d 807 (Mass. 1984) ..... 7, 16
*Mills v. Maine*, 118 F.3d 37 (CA1 1997) ..... 18
*Muir v. Sallie Mae Servicing Corp. (In re Muir)*, 239 B.R. 213 (Bankr. D. Mont. 1999) ..... 14
*New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S.2d 356 (N.Y. App. Div. 1999) ..... 7, 16
*New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S.2d 356 (N.Y. App. Div. 1999) ..... 7
*Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) ..... 3, 17
*Pennsylvania Dep't of Corrections v. Yeskey*, 254 U.S. 206 (1998) ..... 10
*Sandoval v. Hagan*, 197 F.3d 484 (CA11 1999) ..... 9
*Schatz v. Franchise Tax Board*, 81 Cal. Rptr. 2d 719 (Cal. App. 1999) ..... 7
*Seminole Tribe v. Florida*, 517 U.S. 44 (1996) ..... 18
*Snyder v. Nebraska*, 228 B.R. 712 (Bankr. D. Neb. 1998) ..... 14
*South Dakota v. Dole*, 483 U.S. 208 (1987) ..... 3
*Stepp v. Stepp*, 955 P.2d 722 (Okla. 1998) ..... 7
*Tucker v. Louisiana Dep't of Revenue & Taxation*, 708 So. 2d 782 (La. App. 1998) ..... 7
*United States v. Mottolo*, 605 F. Supp. 898 (D. N.H. 1985) ..... 14
*Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351 (Vt. 1998) ..... 7, 16
*Virginia Department of Education v. Riley*, 106 F.3d 559 (CA4 1997) ..... 10
*Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) ..... 4

*Wilson-Jones v. Caviness*, 99 F.3d 203 (CA6 1996) .. 18
*Wyoming v. Straight (In re Straight)*, 143 F.3d 1387 (CA10 1998) ..... 12

**Statutes**:

42 U.S.C. §4601 *et seq*.. ..... 18
11 U.S.C. §362(a) ..... 16
11 U.S.C. §362(c) ..... 16
11 U.S.C. §362(d) ..... 16
11 U.S.C. §523(a) ..... 7
11 U.S.C. §523(a)(8) ..... 6
20 U.S.C. §1087aa *et seq* ..... 4
20 U.S.C. §1092(e) ..... 5
20 U.S.C. §1092(f) ..... 5
20 U.S.C. §1094(a)(14) ..... 5
20 U.S.C. §1094(a)(23) ..... 5
20 U.S.C. §1094(c) ..... 6
20 U.S.C. §§1087hh ..... 5
28 U.S.C. §1334(b) ..... 6
28 U.S.C. §1094(c)(3)(B) ..... 15
34 C.F.R. §674.49 ..... 16

**Rules**:

Fed. R. Civ. P.12(b) ..... 17

No. 99-1048

# In the Supreme Court of the United States

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KANSAS STATE UNIVERSITY,
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MARK AND GENEVIEVE INNES,
*Respondents*.

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Amicus Curiae Brief of Texas, *et al.*,
In Support of Petition for Writ of Certiorari

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## INTEREST OF AMICI CURIAE

The Perkins student loan program provides loans to students in every state through universities and colleges, including many state-affiliated institutions. All states will be affected if participation in the Perkins loan program results in waiver of the states' Eleventh Amendment immunity from suit in federal court. Beyond the immediate context of federally subsidized student loan programs, the prospect of a federal executive branch agency effectuating a waiver of the states' Eleventh Amendment immunity by regulation or contract, without express congressional authorization, creates substantial concerns for all states, which participate in numerous federally-subsidized programs in a variety of areas. *Amici* therefore have a vital interest in the outcome of this case.

## SUMMARY OF ARGUMENT

This case asks whether federal agencies, in the absence of any congressional authorization, may promulgate regulations or draft contracts that require state institutions to waive their Eleventh Amendment immunity. The statute authorizing the Perkins loan program does not authorize or require waiver of Eleventh Amendment immunity. Nor does the statute suggest that states may be sued in federal court for non-compliance with any Department of Education regulation or contract under the program.

The Tenth Circuit, in holding that KSU waived its immunity, failed to recognize that there is no federal statutory provision that could form the basis for a waiver under the Spending Clause. The court of appeals also misconstrued relevant DOE regulations, none of which require state institutions administering Perkins loan funds to litigate suits in bankruptcy court in cases where no proof of claim is filed. State courts have concurrent jurisdiction over such suits, and state institutions on a number of occasions have exercised their option to proceed in state court. Nothing in the DOE regulations or contracts prohibits such a procedure, and the regulations therefore do not unambiguously require state institutions to litigate in federal court.

The "waiver by regulation or contract" approach adopted by the Tenth Circuit could open a floodgate of induced Eleventh Amendment waivers under the Spending Clause without Congress even attempting to authorize those waivers. The court of appeals erred in broadly construing the waiver doctrine, and the Court should grant the petition in this case to resolve that issue.

## ARGUMENT

### I. CONGRESS MAY NOT REQUIRE AN IMPLICIT WAIVER OF ELEVENTH AMENDMENT IMMUNITY UNDER THE SPENDING CLAUSE WITHOUT CLEAR NOTICE OF ITS INTENT.

The Court's recent Eleventh Amendment cases raise, without deciding, the issue of the extent to which Congress may use its Spending Clause power to induce states to waive their Eleventh Amendment immunity. *Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999) ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits. *Cf. South Dakota v. Dole*, 483 U.S. 208 (1987)."); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2231 (1999) ("[W]e have held in such cases as [*Dole*] that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take . . . ."). When Congress has not spoken clearly (or at all) with regard to Eleventh Amendment immunity waiver, however, *amici* believe that agencies may not use regulations or contracts to require states to waive their immunity.

In considering, in a variety of contexts, whether Congress has successfully abrogated states' Eleventh Amendment immunity, the Court has repeatedly set forth a strict standard that must be met by any statute. Congress must, in the statute, evidence its intent to abrogate immunity and "must do so unambiguously ... enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The

mere receipt of federal funds cannot establish that a state has consented to suit in federal court. Instead, a federal *statute* must "evince an unmistakable congressional purpose" to effectuate the waiver, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246-47 (1985), and "Congress [must] speak with a clear voice" when it does so. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 1670 (1999); *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Although additional issues are presented by KSU's petition,[1] *amici*'s primary focus is whether, as the court of appeals decided, an executive agency regulation or contract may require an Eleventh Amendment waiver in the absence of any congressional authorization. Whether "waiver by regulation" or "waiver by contract" can supplant "clear Congressional statement in a statute" is an important issue worthy of the Court's attention.

## II. THE STATUTE GOVERNING THE PERKINS STUDENT LOAN PROGRAM IS SILENT WITH RESPECT TO ANY WAIVER OF ELEVENTH AMENDMENT IMMUNITY BY STATES PARTICIPATING IN THE PROGRAM.

Congress created "Federal Perkins Loans" to provide low-interest loans for needy students at institutions of higher education. *See* 20 U.S.C. §1087aa *et seq*. But the statute authorizing Federal Perkins Loans contains not the slightest hint that a state institution choosing to participate in the program will thereby waive (or be required to waive) its

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1. Also presented in the case is the issue of the degree of specificity required in a state statute or state constitutional provision to authorize lower-level state employees to waive a state's immunity.

immunity in federal court in suits relating to loan collection or discharge.

The Federal Perkins Loan statute contains some explicit, and quite detailed, requirements for participating institutions, including state schools. Congress clearly knew how to, and did, condition appropriation of Perkins Loan funds on institutions agreeing to do certain things deemed important by Congress. Participating state institutions must maintain extensive, daily records of campus crime statistics and make such information available to the public and the Secretary of Education. 20 U.S.C. §1092(f). Participating institutions in certain states must distribute voter registration forms to students. §1094(a)(23). They must report annually on students receiving athletically related student aid. §1092(e).

The statutory list of requirements is long and elaborate, but the statute contains no hint, much less a "clear statement," of an "unambiguous congressional purpose" that states surrender their Eleventh Amendment immunity to participate in the program. The statute does contain, as do many large federal programs funded under the Spending Clause, a general authorization for the Department of Education to promulgate implementing regulations and to enter into contracts or other agreements with state agencies or participating institutions of higher learning. *See* §§1087hh, 1094. There is also a statutory requirement that participating institutions develop Default Management Plans with respect to defaulted loans and that the plans be approved by the DOE. *See* §1094(a)(14).

The statute does not contain any congressional directive concerning where suits to collected defaulted loans are to be maintained, and the statute makes no reference

whatsoever to the proper court in which states should defend suits seeking to discharge student loan obligations. To the extent the statute speaks to the potential liability of state institutions for noncompliance with Perkins Loan Program requirements, it does so only by providing for civil penalties and administrative hearings in the DOE. §1094(c). The statute does not, however, contain a specific grant of jurisdiction to federal courts to hear disputes involving Perkins loans; nor does it purport either to abrogate immunity or to authorize the agency to require waivers of immunity.

The Bankruptcy Code is similarly devoid of any provision limiting litigation over student loans to the federal court system. Dischargeability disputes[2] are civil proceedings arising under or related to cases under Title 11, and therefore are matters within the concurrent jurisdiction of federal and state courts, not the exclusive jurisdiction of federal district and bankruptcy courts. 28 U.S.C. §1334(b). The court of appeals's reference to *Brown v. Felsen*, 442 U.S. 127, 135-36 (1979), for the proposition that "Congress granted bankruptcy courts exclusive jurisdiction to determine whether a debt is dischargeable," 184 F.3d at 1284, was misguided. *Brown v. Felsen* was decided under the now-repealed Bankruptcy Act of 1898. Under §1334(b) of the present Bankruptcy Code, effective in 1978, jurisdiction over dischargeability suits such as the one in this case is concurrent between federal and state courts.

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2. Under 11 U.S.C. §523(a)(8), debtors may be able to discharge student loan obligations if they are able to show that repayment will constitute an "undue hardship."

Although the great majority of dischargeability suits are undoubtedly determined in federal bankruptcy courts, state courts can and do exercise their concurrent jurisdiction to make dischargeability determinations, including the dischargeability of student loans. *See, e.g., Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351 (Vt. 1998) (determining student loan of ex-bankruptcy debtor to be nondischargeable); *Massachusetts Higher Educ. Assistance Corp. v. Taylor*, 459 N.E.2d 807 (Mass. 1984) (same); *New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S. 2d 356 (N.Y. App. Div. 1999). State court suits determining dischargeability under other subsections of 11 U.S.C. §523(a) are also fairly common. *See, e.g., Schatz v. Franchise Tax Board*, 81 Cal. Rptr. 2d 719 (Cal. App. 1999) (tax debt nondischargeable); *Tucker v. Louisiana Dep't of Revenue & Taxation*, 708 So. 2d 782 (La. App. 1998) (same); *Stepp v. Stepp*, 955 P.2d 722 (Okla. 1998) (support alimony not dischargeable); *Macy v. Macy*, 714 P.2d 744 (Wyo. 1986) (child support obligations not dischargeable).

In summary, Congress by statute has neither provided for any type of waiver of Eleventh Amendment immunity in the Perkins Loan Program statutes, nor provided for exclusive federal court jurisdiction over student loan dischargeability suits arising under the Bankruptcy Code. If states have waived their immunity from suits to determine the dischargeability of Perkins loans, it is not Congress that has effectuated the waiver.

## III. THE TENTH CIRCUIT'S FAULTY ANALYSIS CREATES THE POTENTIAL FOR BROAD MISAPPLICATION IN MANY IMPORTANT AREAS OF FEDERAL-STATE RELATIONS.

The court of appeals's opinion contains no reference or citation to any federal statute that arguably could provide the basis for a Spending Clause-based waiver of KSU's immunity. The court of appeals acknowledged that "this case does not present the exact language" required by Supreme Court cases to affect states' immunity, 184 F.3d at 1283, but glossed over the fact that this case does not present *any language at all* in a federal statute concerning waiver. Rather, the court of appeals created its own substitutes for clear statutory language:

(1) The court of appeals treated DOE regulations and the DOE's contract with KSU as being equivalent to a clear congressional statement in a statute; and

(2) The court of appeals improperly treated a State's acceptance of funds under Spending Clause legislation as being the same thing as filing a pleading seeking affirmative relief in a federal court.

Neither rationale survives careful analysis.

### A. "Waiver by Regulation" Is Not a Recognized Method for Accomplishing Waivers of Eleventh Amendment Immunity Without Accompanying Statutory Language.

When called upon to decide whether requisite notice has been given to a state or local government entity that engaging in certain conduct may give rise to suit in federal court, courts sometimes consider interpretive regulations

promulgated by federal executive branch agencies. But when courts have looked to agency regulations on notice issues, they have done so only when the regulations accompany statutory language that itself has been found to contain a clear indication that Congress intended to subject the governmental defendant to suit in federal court.

For example, in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), this Court took note of DOE policy guidelines regarding student-on-student sexual harassment. But the guidelines related to what this Court termed "Title IX's plain language" putting all recipients of Title IX funds on notice that they could be held liable in federal court for discrimination based on sex. The DOE guidelines, once promulgated, merely added to the statutory notice.

A number of lower courts have similarly reviewed federal agency regulations in cases involving alleged abrogations or waivers of Eleventh Amendment immunity. *Sandoval v. Hagan*, 197 F.3d 484 (CA11 1999) (Department of Justice regulations relating to Title VI of the Rehabilitation Act); *Litman v. George Mason University*, 186 F.3d 544, 553 (CA4 1999) (DOJ regulations implementing Title IX). *Amici* do not concede that those courts correctly resolved the immunity issues before them, but it is significant that the courts were addressing statutory—not regulatory—abrogations or waivers of immunity. The ultimate issue in those cases was whether a statute contained a requisite "clear statement" as to state immunity, with the regulations viewed as, at most, providing supplementary notice to the statutory language in question. Federal agency regulations, standing alone in the absence of a statute, cannot provide adequate notice to states that they

are waiving their Eleventh Amendment immunity from suit in federal court.

The Eleventh Circuit, for instance, has characterized the Court's precedents as requiring that a Spending Clause-based waiver statute "read like a prospectus and give funding recipients a clear signal of what they are buying." *Davis v. Monroe County*, 120 F.3d 1390, 1399 (CA11 1997), *rev'd on other grounds*, 526 U.S. 629 (1999). A DOJ or DOE regulation or contract that informs states of an agency's view (whether correct or incorrect) that a particular type of conduct will lead to suit in federal court only adds to the detail of the "statutory prospectus" initially provided by Congress. However, when Congress's language in a statute is ambiguous or (as in this case) non-existent with regard to abrogation or induced waiver of state immunity, an administrative agency's interpretation of the statute cannot be used to "fill in the gap" and thereby subject states to suit in federal court. *See Amos v. Maryland*, 126 F.3d 589, 606 (CA4 1997).[3]

Similarly, in *Virginia Department of Education v. Riley*, 106 F.3d 559 (CA4 1997), the Fourth Circuit was presented with an argument that if statutory provisions (of the Individuals with Disabilities Education Act) were

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3. The Fourth Circuit's determination in *Amos* that the ADA was ambiguous with respect to its application to prisons was later reversed in light of this Court's decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 254 U.S. 206 (1998). See *Amos v. Maryland Dep't of Public Safety and Correctional Services*, 178 F.3d 212 (CA4 1999). Only upon determining that an unambiguous statement was present in the statute did the Fourth Circuit agree that deference to administrative regulations was appropriate with respect to the ADA's application to state prisons.

ambiguous, the court should defer to a reasonable interpretation by a federal agency "as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States." *Id.* at 567. The Fourth Circuit disagreed: "It is axiomatic that statutory ambiguity defeats altogether a claim . . . that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Id.* If statutory ambiguity is sufficient to defeat a claim of waiver, then surely statutory silence in the Perkins Loan Program will also suffice.

*Gregory v. Ashcroft*, 501 U.S. 452 (1985), points out one of the most important reasons why courts must base Eleventh Amendment waiver findings on the presence of clear language in statutes:

> "Inasmuch as this Court in *Garcia* [*v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985)] has left primarily to the political process the protection of the States against intrusive exercises of Congress' [Article I] powers, we must be absolutely certain that Congress intended such an exercise." *Id.* at 464.

In this case, the court of appeals treated regulations promulgated by the DOE, an executive agency, and a corresponding contract with KSU as being functionally equivalent to clear provisions in a statute; but they are not equivalent because an agency acting without express congressional authorization can entirely bypass the protective "political process" described in *Gregory*. After the Court's references to the possibility of Spending Clause-based waivers in *Alden* and *College Savings Bank*, the Court will doubtless face challenges to congressional attempts to

use its Article I Spending Clause power to obtain waivers of immunity that it could not abrogate under its other Article I powers. But though Congress may attempt in the future to attempt to condition federal funding of Perkins loan program or other programs on an express waiver of Eleventh Amendment immunity, the fact remains that it has not done so. If and when it does, Senators and Representatives dependent upon state voters for their election and re-election will have to weigh the importance of their home states' interests. But the DOE is not directly answerable to any state constituency and, for that reason, DOE-promulgated regulations and contracts, standing alone, should not provide a basis to deem immunity waived where Congress has not spoken.

### B. Signing a Contract Agreeing to Comply with Agency Regulations Is Fundamentally Different From Voluntarily Filing a Pleading in Federal Court Seeking Affirmative Relief.

Just as it failed to identify any statute containing a clear statement of Congress's intent to condition state participation in the Perkins Loan Program on waiver of immunity, the court of appeals failed to identify any case law indicating that signing a contract obligating a state entity to comply with federal regulations is enough to waive immunity. Instead, the best the court of appeals could do was list a string of bankruptcy cases holding that "a state may consent to a federal court's jurisdiction through its affirmative conduct."[4] In each of the cases cited by the court

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4. 184 F.3d at 1280 (quoting *Georgia Department of Revenue v. Burke (In re Burke)* 146 F.3d 1313, 1318 (CA11 1998), and citing *Gardner v. New Jersey*, 329 U.S. 565 (1947); *Wyoming v. Straight (In*

of appeals, the state's "affirmative conduct" was the same: filing a pleading (either a proof of claim or a pleading initiating an adversary proceeding) in bankruptcy court consenting to the court's jurisdiction.

KSU did nothing of the sort in this case. It never filed a proof of claim, and the only appearance it made in an adversary proceeding was to defend itself by asserting immunity and seeking to dismiss the suit. The court of appeals opined: "None of these cases rely on the text of a state statute or constitution to determine that the state waived immunity." 184 F.3d at 1280. That statement is unsound in two respects. First, the court of appeals inexplicably failed to focus on whether a contract agreeing to abide by agency regulations which arguably require litigation in federal court is sufficient to waive Eleventh Amendment immunity in the absence of any *federal* statutory authority. Instead, the court of appeals focused on cases in which, consistent with *state* law, the state waived immunity by filing federal court pleadings. Second, the court failed to take into account the Court's rationale in *Gardner v. New Jersey*, 329 U.S. 565 (1947), in which the Court specifically relied on the text of state statutes authorizing a state comptroller and attorney general to waive immunity by filing pleadings in federal court. *See id.* at 574-75.

When a state agency, through duly authorized officials, makes a conscious decision to file a pleading seeking affirmative relief from a federal court, it is neither surprising nor disturbing (from the agency's perspective) for the court to find that it has jurisdiction over the agency's

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*re Straight)*, 143 F.3d 1387 (CA10 1998); *DeKalb County v. Platter (In re Platter)*, 140 F.3d 676 (CA7 1998)).

claim and any compulsory counterclaims asserted defensively against the agency. That aspect of Eleventh Amendment immunity waiver is well-settled law,[5] but it does not apply in this case, in which KSU filed no pleading and sought no affirmative relief from any federal court. No reported case prior to the court of appeals's opinion[6] supports the proposition that "affirmative conduct" in the form of a contract agreeing to comply with federal regulations—in the absence of any *federal statute* signifying Congress's intent to affect a state's immunity—will constitute a waiver. In fact, as the court of appeals acknowledged, there is case law directly to the contrary. *Florida Dep't of Health & Rehabilitation Services v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (state's immunity not waived by agreement to comply with agency regulations, in the absence of any clear congressional statement in a statute). The possibility that KSU *might* have waived its immunity if it had decided to seek affirmative relief from a federal court by filing a proof of claim in the Innes bankruptcy case (which KSU declined to do) does not mean that the state did waive its immunity merely by signing a contract agreeing to follow federal regulations.

The court of appeals attempted to bridge the logical gap between (a) filing pleadings seeking affirmative relief in

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5. *United States v. Mottolo*, 605 F. Supp. 898, 910 (D. N.H. 1985) (collecting cases).

6. *Snyder v. Nebraska*, 228 B.R. 712 (Bankr. D. Neb. 1998), rejected the rationale adopted by the court of appeals. Another bankruptcy court, without citing the court of appeals's opinion, has also now held that DOE regulations require states to litigate dischargeability suits in federal court. *Muir v. Sallie Mae Servicing Corp. (In re Muir)*, 239 B.R. 213, 219-20 (Bankr. D. Mont. 1999).

federal courts and (b) contracting to follow federal regulations by construing the federal regulations here as obligating KSU to appear in federal court. Even if the court of appeals was correct, which it was not, in so construing the DOE regulations in question, it does not follow that KSU's immunity was waived. The remedy for KSU's breach of a contract to appear in federal court is not necessarily to deem KSU's immunity waived. Instead, the DOE—if it determined that KSU had such an contractual obligation and breached it, which the DOE does not appear to have done—could presumably take appropriate steps to enforce the contract, including seeking to impose appropriate penalties on KSU in an administrative proceeding, 28 U.S.C. §1094(c)(3)(B), or conditioning future participation in the Perkins program on correcting the violation. But DOE is not seeking to enforce the contract. Instead, individual Perkins loan recipients, attempting to cloak themselves in the role of third-party beneficiaries of the DOE's contract, filed a private lawsuit against KSU in federal court to remedy an alleged breach. (Again, assuming for the sake of argument that the DOE's contract required KSU to appear in federal court to defend on the merits all dischargeability suits, which the contract did not do.) The court of appeals has essentially granted to private third parties (the individual debtors in this bankruptcy case) a specific performance remedy, enforceable in federal court, with respect to KSU's contract with the DOE.

That the court of appeals would take such a step is even more surprising in view of the fact that the DOE regulations in question do not unambiguously require KSU to litigate in federal court dischargeability suits of the type brought in this case. The court of appeals identified three primary regulations that it considered to require litigation by

KSU in federal court. None of the regulations imposes any such requirement.

(1) 34 C.F.R. §674.49(a) merely restates the statutory obligation to respect the 11 U.S.C. §362(a) automatic stay by suspending non-bankruptcy collection efforts. The regulation requires no appearance in federal courts. Once the stay lifts,[7] creditors holding nondischargeable debts may proceed in state court, as a number of state student loan agencies have done.[8]

(2) 34 C.F.R. §674.49(b) requires institutions to file a proof of claim in borrowers' bankruptcies unless the borrower has no assets. The regulation makes no mention of dischargeability adversary proceedings and does not indicate that the penalty for failing to file a proof of claim is loss of immunity as opposed to simply denying recovery from the bankruptcy estate.

(3) 34 C.F.R. §674.49(c) requires institutions to follow certain procedures in bankruptcy proceedings if "properly served with a complaint" to determine dischargeability. It does not purport to determine, however, whether a complaint barred by the Eleventh Amendment is "properly served." One of the procedures to be followed is

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7. Under 11 U.S.C. §362(c), the automatic stay terminates upon the closure or dismissal of a case, or upon the entry of a general discharge order. The stay may also be lifted for cause under 11 U.S.C. §362(d).

8. *See Vermont Student Assistance Corp. v. Zeichner*, 708 A.2d 1351 (Vt.1998); *Massachusetts Higher Educ. Assistance Corp. v. Taylor*, 459 N.E.2d 807 (Mass.1984); *New York State Higher Educ. Services Corp. v. Kaplan*, 684 N.Y.S.2d 356 (N.Y.App. Div. 1999). Each of these cases involved post-bankruptcy state court suits to collect student loan debts.

to "oppose" the request for discharge in some circumstances. It is a novel proposition indeed to suggest that exercising rights under Rule 12(b) to obtain dismissal of a suit is not "opposing" such suit. Most Rule 12(b) movants in federal court suits certainly believe they are "opposing" the suits brought against them. That is particularly so where, as here, successful opposition under a Rule 12(b) dismissal motion leaves the movant free to "oppose" dischargeability in a forum it prefers—state court.

The cited regulations are ambiguous, at best, with respect to any duty of a state institution to answer and defend on the merits a dischargeability suit in federal court. Were the regulations a part of the Perkins Loan Program statutes, they would not be sufficient to create an immunity waiver. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) (Congress must act "unambiguously" when it intends to impose a condition on the grant of federal money). In the form of either agency regulations or a contract agreeing to abide by agency regulations, they cannot create a valid basis for waiver of Eleventh Amendment immunity.

### C. The Potential Impact of a "Waiver by Regulation" Doctrine Is Broad.

Once waiver of states' Eleventh Amendment immunity is divorced from clear statements of congressional intent in the text of statutes, the possibilities for "waiver by agency regulation" become numerous. Any federal agency given general authority to promulgate regulations and contracts governing use of federal money appropriated under the Spending Clause would be able to devise waiver provisions that would bind states accepting the money. Among the possibilities are the following:

(1) The Department of Labor, which disburses federal funds to state agencies providing unemployment benefits, could condition funding on agreements by states to comply with provisions of federal labor laws, such as the Fair Labor Standards Act. Courts have held, in the wake of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that the FLSA's abrogation of State immunity under the Commerce Clause is unconstitutional,[9] but Congress has not yet attempted to exercise whatever authority it may have under the Spending Clause to induce states to waive immunity from FLSA suits.

(2) The Environmental Protection Agency, which administers "Superfund" clean-up funds appropriated by Congress, could, by regulation and contracts with states, condition acceptance of such funds on waiver of Eleventh Amendment immunity from claims under CERCLA, 42 U.S.C. §4601 *et seq*. Under *Seminole*, attempted abrogation under CERCLA suits does not pass constitutional muster,[10] but Congress has not tried to condition Spending Clause-based Superfund appropriations on waivers of state immunity.

(3) If the federal Health and Human Services Department desires to link Medicaid funds to contractual/regulatory provisions waiving state agencies' immunity from suit in the rapidly-growing number of nursing home and hospital bankruptcies, it may presumably

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9. *Alden v. Maine*, 119 S.Ct. 2240 (1999); *Wilson-Jones v. Caviness*, 99 F.3d 203 (CA6 1996); *Mills v. Maine*, 118 F.3d 37 (CA1 1997).

10. *Burnette v. Carothers*, 192 F.3d 52, 57 (CA2 1999).

do so under the court of appeals's rationale, regardless of whether Congress has acted in the area.

*Amici* do not concede that Congress could appropriately require waivers in any of these circumstances, even if set forth by Congress in clear language in a statute, but, at the very least, none should be valid in the absence of express congressional intent and states' informed decisions to accept funding linked to such conditions. Yet the court of appeals's finding of waiver in this case in the absence of any federal statutory provision suggests that federal agencies can accomplish just such waivers. Any protection enjoyed by states in the legislative branch political process, as envisioned by *Garcia*, evaporates under such an approach. While agency regulations may sometimes attempt to spell out what Congress intended in a Spending Clause statute, and thereby add to the degree of notice given to states accepting funds under the statute, that is not the situation in this case. Rather, this case raises the question of whether agency regulations or contracts, however ambiguous, can *create* the basis for a waiver under the Spending Clause. The importance of that question warrants granting KSU's petition in this case.

## CONCLUSION

Whether regulations or contracts drafted by a federal executive branch agency, in the absence of any explicit statement by Congress in the text of Spending Clause legislation, can create a waiver of Eleventh Amendment immunity is an issue of vital import to many states in a wide variety of areas. Granting KSU's petition for writ of certiorari in this case will provide the opportunity for valuable guidance to states and federal agencies administering funds appropriated under the Spending Clause.

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No. 99-1048

IN THE
# Supreme Court of the United States

KANSAS STATE UNIVERSITY,

*Petitioner,*

v.

MARK AND GENEVIEVE INNES,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## REPLY BRIEF FOR PETITIONER

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129

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . ii

REASONS FOR GRANTING THE WRIT . . . . . 1

I. The Tenth Circuit Rendered A Decision In Conflict With The Decisions Of This Court And Of Other United States Courts Of Appeal When It Held That A State Official Need Not Have Explicit Authority To Waive A State's Eleventh Amendment Immunity In Order To Effect Such A Waiver. . . . . 1

II. The Tenth Circuit's Decision That Congress Can Delegate Its Spending Powers To Administrative Agencies In The Executive Branch To Effect A Conditional Waiver Of A State's Eleventh Amendment Immunity Conflicts With Relevant Decisions Of This Court . . . . . 4

III. The Tenth Circuit's Decision That A State Can Constructively Waive Its Eleventh Amendment Immunity By Agreeing To Follow Federal Regulations Conflicts With Relevant Decisions Of This Court . . . . . 5

CONCLUSION . . . . . 8

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) ..... 3, 4, 6

*Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975) ..... 4

*Clark v. Barnard*, 108 U.S. 436 (1883) ..... 4

*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) ..... 5

*In re Collins*, 173 F.3d 924 (4th Cir. 1999), *cert. denied sub nom. Virginia v. Collins*, 120 S. Ct. 785 (2000) ..... 2

*Edelman v. Jordan*, 415 U.S. 651 (1974) ..... 6

*Employees of Dep't of Pub. Health and Welfare, Missouri v. Department of Pub. Health and Welfare, Missouri*, 411 U.S. 279 (1973) ..... 5

*Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) ..... 6

*Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945) ..... 1, 2

*Gardner v. State of New Jersey*, 329 U.S. 565 (1947) ..... 4

*Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992) ..... 2

*Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) ..... 4, 6

*Parden v. Terminal Ry. Co. of Ala. Docks Dep't*, 377 U.S. 184 (1964) ..... 5

*Peter Kiewit & Sons' Co. v. State Highway Comm'n*, 184 Kan. 737, 339 P.2d 267 (1959) ..... 3

*Port Authority Trans-Hudson Corp v. Feeney*, 495 U.S. 299 (1990) ..... 4

*In re Rose*, 187 F.3d 926 (8th Cir. 1999), *disagreed with by In re Seay*, 244 B.R. 112 (Bankr. E.D. Tenn. 2000) . . . . . 2
*Rosebud Sioux Tribe v. Val-U Construction, Co.* 50 F.3d 560 (8th Cir. 1995) . . . . . 3, 5
*In re Seay*, 244 B.R. 112 (Bankr. E.D. Tenn. 2000) . . . . . 2
*Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974) . . . . . 2

**Rules and Regulations**

64 Fed. Reg. 58,297 (1999) . . . . . 7

**Miscellaneous**

Christopher Johnsen & James C. Todd, *Federal Immunity Law in Higher Education*, 26 J.C. & U.L. 221 (1999) . . . . . 7

## REPLY BRIEF FOR PETITIONER

At a minimum, respondents' brief in opposition (Resp.) demonstrates that there is confusion, uncertainty and conflict in the Courts of Appeal regarding the circumstances in which a State may waive its Eleventh Amendment immunity, perhaps particularly in the bankruptcy context. Furthermore, respondent's efforts to distinguish the Tenth Circuit's holdings in this case from recent, clear decisions of this Court interpreting the Eleventh Amendment are unavailing. Thus, Kansas State University respectfully requests that this Court either summarily reverse the erroneous decision of the Tenth Circuit in this case or, in the alternative, grant *certiorari* and set this case for plenary review.

### I. The Tenth Circuit Rendered A Decision In Conflict With The Decisions Of This Court And Of Other United States Courts Of Appeal When It Held That A State Official Need Not Have Explicit Authority To Waive A State's Eleventh Amendment Immunity In Order To Effect Such A Waiver.

The Tenth Circuit's decision in this case conflicts with relevant decisions of this Court *and* the decisions of several other United States Courts of Appeal on the same important issue whether a state official needs to have the express authority to waive a state's right which is recognized in the Constitution. Even respondents' discussion of this issue demonstrates differences of opinion and confusion in the Courts of Appeal, warranting this Court's review of the Tenth Circuit's decision.

Respondent's characterization of *Ford Motor Co. v. Department of the Treasury of Indiana*, 323 U.S. 459 (1945), ignores the case's holding and the multitude of Circuit decisions that reject respondents' reading of *Ford Motor Co.* The Court in *Ford Motor Co.* held that a state official's authority to waive the State's Eleventh Amendment immunity is determined by that State's Constitution, statutes and decisions. Respondent incorrectly concludes that because

Indiana's Constitution required general waivers of immunity and Kansas's Constitution is silent, there is an *implicit* grant of authority for waiver in Kansas unless *expressly withheld* by statute. Resp. at 1-2. That conclusion goes beyond anything the Court said or held in *Ford Motor Co.*, ignores numerous contrary Court of Appeals decisions, and flies in the face of this Court's more recent Eleventh Amendment decisions.

*Ford Motor Co.* held that the authority to waive the Eleventh Amendment is an issue of state law determined by the state's Constitution, statutes and decisions. *Id.* at 467. The question becomes: when all such sources of state law are silent, is authority to waive granted or denied? The answer is clear and comes from the inherent nature of the State's immunity, recognized but not created by the Eleventh Amendment. Under this Court's Eleventh Amendment decisions, all a state needs to do to preserve its constitutional immunity is assert it. The immunity can only be waived where the state affirmatively invokes the jurisdiction of a federal court or *expressly* waives the immunity. Neither condition is present here. Thus, the Tenth Circuit's decision is contrary to this Court's relevant decisions and should be summarily reversed or *certiorari* granted to resolve the issue.

At a minimum, respondents demonstrate that there is conflict between the Tenth Circuit and other Circuits on this important issue.[1] Regardless of one's interpretation of these

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[1] Respondents cite several Court of Appeals decisions that Respondent asserts conflict with those cited by Kansas State University in its petition. *See e.g. In re Rose*, 187 F.3d 926 (8th Cir. 1999) (finding waiver through invocation of federal jurisdiction, relying on *In re Collins*, 173 F.3d 924 (4th Cir. 1999), *cert. denied sub nom. Virginia v. Collins*, 120 S. Ct. 785 (2000)), *disagreed with by In re Seay*, 244 B.R. 112, 117-18 (Bankr. E.D. Tenn. 2000); *Hankins v. Finnel*, 964 F.2d 853, 859 (8th Cir. 1992) (finding waiver for prospective and injunction relief already allowed under *Ex Parte Young* doctrine); *Vargas v. Trainor*, 508 F.2d 485, 492 (7th Cir. 1974) (holding that "[a] representation made in a judicial proceeding for

various cases, respondents' assertions and citations emphasize the fact that there is conflict among the Circuits on this important issue.

Finally, waiver of the Eleventh Amendment is not the same as waiver of general sovereign immunity or of contractual rights. *See e.g. Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560 (8th Cir. 1995) (rejection of Indian tribe's attempt to raise sovereign immunity against the other party with whom it had contracted); *Peter Kiewit & Sons' Co. v. State Highway Comm'n*, 184 Kan. 737, 741-42, 339 P.2d 267, 271 (1959). Thus, respondents incorrectly rely upon cases involving affirmative invocation of federal jurisdiction and tort sovereign immunity. Respondents appear to argue that waiver of sovereign immunity in one context (e.g., tort claims against the State) constitutes a valid *inference for waiver* of all immunities in all courts. See Resp. at 1-2. *Ford Motor Co.* long ago rejected that proposition. Indeed, this Court has been quite clear that a state's general waiver of sovereign immunity from tort suits in state court does not waive the State's Eleventh Amendment immunity from suits in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

KSU respectfully requests that this Court summarily reverse the Tenth Circuit's erroneous decision or, in the alternative, grant *certiorari* to resolve this issue.

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the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*."); *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1999) (Indian tribe attempted to assert sovereign immunity—not Eleventh Amendment immunity—against other party to construction contract).

## II. The Tenth Circuit's Decision That Congress Can Delegate Its Spending Powers To Administrative Agencies In The Executive Branch To Effect A Conditional Waiver Of A State's Eleventh Amendment Immunity Conflicts With Relevant Decisions Of This Court.

Ignoring the language of the Tenth Circuit's decision, respondents argue that KSU expressly waived its Eleventh Amendment immunity by affirmatively invoking federal jurisdiction. The Tenth Circuit, however, did not find *express* waiver or *voluntary invocation* of federal jurisdiction. Rather, the Tenth Circuit relied upon language in the regulations and contract of a federal agency to conclude that KSU's Eleventh Amendment immunity was "deemed" waived. *Cf. Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 654 (2000) (Thomas, J., concurring in part, dissenting in part) (emphasizing the *Atascadero* clear statement requirement and questioning whether even *statutes* incorporating abrogation provisions of other *statutes* by reference can satisfy that requirement); *Port Authority Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 305-06 (1990) (finding unequivocal express waiver in statute alone, and not agency regulations).

KSU has not affirmatively and voluntarily invoked the jurisdiction of the federal courts. *Cf. Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *Gardner v. State of New Jersey*, 329 U.S. 565 (1947). A *contract* alone surely cannot be such an invocation. Moreover, mere authority to contract is different from authority to waive a State's constitutional immunity. This Court has made clear that the standard for waiving that immunity is very high and will be found in only the clearest and most unequivocal instances. *Port Authority Trans-Hudson Corp v. Feeney*, 495 U.S. 299, 305-06 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-41 (1985). The legal treatment of agreements for aviation services, *Brown v. Wichita State University*, 217 Kan. 279, 540 P.2d 66 (1975)

(tort immunity of State found invalid after tragic death of student athletes in plane crash), or construction, *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560 (8th Cir. 1995) (rejection of Indian tribe's attempt to raise sovereign immunity against the other party with whom it had contracted), does not illuminate the Eleventh Amendment issues raised in this case, which arise under a contract between the USDOE and KSU, and to which respondents are not even parties.

KSU respectfully requests that this Court summarily reverse the Tenth Circuit's erroneous decision or, in the alternative, grant *certiorari* to resolve this issue.

## III. The Tenth Circuit's Decision That A State Can Constructively Waive Its Eleventh Amendment Immunity By Agreeing To Follow Federal Regulations Conflicts With Relevant Decisions Of This Court.

KSU has performed no affirmative act that has expressly waived its Eleventh Amendment immunity. The Tenth Circuit found waiver by examining the totality of the circumstances and piling inference upon inference. Quite simply, as explained in KSU's petition, the Tenth Circuit found an implied, constructive waiver, in direct contravention of this Court's recent decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

The only decision of this Court that ever found a constructive or implied waiver of Eleventh Amendment immunity was *Parden v. Terminal Ry. Co. of Ala. Docks Department*, 377 U.S. 184 (1964), which the Court expressly overruled in *College Savings Bank* last year. Although often asserted by parties suing a state, this Court never found constructive waiver of the Eleventh Amendment in another case. *See e.g. Employees of Dep't of Pub. Health and Welfare, Missouri v. Department of Pub. Health and Welfare,*

*Missouri*, 411 U.S. 279, 285 (1973) ("we cannot conclude that Congress conditioned the operation of [state institutions] on the forfeiture of immunity from suit in a federal forum" under the FLSA.); *Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974) (citation omitted) (the Court "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'.... [a]nd while this Court has ... authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."); *Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (agreement to recognize and obey all federal laws in exchange for federal funds insufficient to waive Eleventh Amendment); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245 (1985) (although "any recipient" of federal assistance under federal statute was required to be sued in federal court and states were known recipients, "given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.").

The conduct at issue here is the execution of an agreement between KSU and the USDOE, incorporating by reference federal agency regulations that do not themselves require the waiver of Eleventh Amendment immunity, expressly or otherwise.[2] *Cf. Kimel v. Florida Bd. of Regents*, 120 S. Ct.

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[2] The USDOE recently amended the regulations at issue to clarify their lack of effect on a State's assertion of its Eleventh Amendment immunity. In its official comment to the changes to Section 674.49, the USDOE stated that "[r]ecently, some State institutions have responded to undue hardship complaints by asserting that sovereign immunity barred relief on these claims in bankruptcy proceedings. We intend the proposed

631, 654 (2000) (Thomas, J., concurring) (emphasizing the *Atascadero* clear statement requirement and questioning whether even *statutes* incorporating abrogation provisions of other *statutes* by reference can satisfy that requirement, let alone separate documents promulgated by federal agencies). This is not a case where KSU voluntarily invoked the jurisdiction of the bankruptcy court, nor has KSU expressly waived its Eleventh Amendment immunity. Indeed, as respondents acknowledge, it is a case where the Tenth Circuit *implied* a waiver based on its analysis of all of the facts and circumstances.

KSU respectfully requests that this Court summarily reverse the Tenth Circuit's erroneous decision or, in the alternative, grant *certiorari* to resolve this issue.

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amendment to *make clear* that every institution must use due diligence to oppose discharge, but that State institutions may do so—if they wish—by asserting sovereign immunity as a defense to an undue hardship complaint. Unfortunately, some courts misconstrue Department regulations to bar State institutions from asserting sovereign immunity in these circumstances. We intend this amendment as an *authoritative explanation* of the meaning of the Federal Perkins Loan regulations and Program Participation Agreement on this due diligence obligation." *See* Discussion, Federal Perkins Loan Program, 64 Fed. Reg. 58,297, 58,307 (1999) (emphases added); *see also,* Christopher Johnsen & James C. Todd, *Federal Immunity Law in Higher Education*, 26 J.C. & U.L. 221, 229-30 (1999) (questioning holding of *Innes* because of lack of unequivocal statutory expression of waiver).

## CONCLUSION

For the foregoing reasons, Kansas State University respectfully requests that this Court summarily reverse the decision of the Tenth Circuit or, in the alternative, grant *certiorari* to resolve the Circuit conflict and conclusively establish the criteria necessary for a state to waive its Eleventh Amendment immunity.

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